

NEGOTIATIONS BETWEEN
STATE ACTORS AND NON-STATE ACTORS:
CASE ANALYSES FROM DIFFERENT PARTS
OF THE WORLD

INTERNATIONAL NEGOTIATION SERIES

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VOLUME 7

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STATE ACTORS AND NON-STATE ACTORS:
CASE ANALYSES FROM DIFFERENT PARTS
OF THE WORLD

Edited by

Raymond Saner
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PREFACE

This book is a response to both, the growing intricacy of international relations and to the increasing complexity of international and domestic conflicts. With the end of the Cold War came a proliferation of actors partaking in disputes, be they at local, regional, national or international levels. This growing multiplicity of actors behind conflict and behind the negotiation process has not only made negotiation practice more demanding, but also leads to a need for further development in negotiation theory.

Established training institutes and diplomatic academies have added courses on public diplomacy. Business schools are enriching international management studies with courses borrowing from traditional diplomacy, especially when attempting to explain the workings of supra national organizations such as the United Nations (UN) or the European Union (EU), as well as the proliferation of bilateral and regional free trade agreements (e.g., the North American Free Trade Agreement) whose overlapping boundaries have been usefully compared to a “spaghetti bowl.”

This book takes a step closer to the reality of international conflicts by adding a special focus on the relation(s) between state and non-state actors. Today’s world has gone beyond state-to-state negotiations and conflicts. While these traditional forms of engagement still exist, the more rapid developments have occurred at the boundary of social and political conflicts. The State’s strict jurisdiction over diplomacy as a tool for conflict resolution is being increasingly challenged by economic actors and civil society actors. This new overlapping of convergent and divergent interests between these multiple actors is the focus of this book.

CONTENT OVERVIEW

The book has been organized into three main parts, each

with its own theme. The first part presents conflicts in the environmental and social sectors. Keeping with the focus described above, this section offers analyses of conflicts where national and international non-government organizations (NGOs) confront multinational enterprises and national governments in some more complex cases.

In Part I, water rights and pharmaceutical rights are used to explore environmental and social conflicts: pollution, marine damage, workers rights, access to potentially life-saving pharmaceuticals. Environmental and social conflicts are enjoying increasing media and popular attention, and while these may be “conflicts du jour,” the significance of those presented here comes from their demonstration of contemporary diplomacy, the clear need for increasing domaine expertise amongst a variety of diplomatic roles, and polyateralism.¹ These cases illustrate how non-State actors can engender conflict between states and between states and enterprise, often with significant economic impact. They also serve to demonstrate the powerful role that non-State actors, including supra national organizations such as the UN or NGOs such as Greenpeace, and even national media, can play in promoting either the resolution or renewal of conflict. This is evident in the case of the Global Moratorium on Bottom Trawling, in Ship-Breaking in India, and in the Government Use of Patents in Thailand.

¹ Contemporary Diplomacy, the importance of domaine expertise, and polyateralism are explored in depth in the introduction of this volume.

Part II focuses on malignant military conflicts – i.e., those conflicts lasting and festering for many years (hence the term “malignant”). A multitude of actors have proposed and attempted solutions that range from bilateral negotiations between warring parties, to intervention of the UN (as conciliators, peace makers, peace enforcers, etc.), to civil society organizations who act as intermediaries. Such intermediaries are not disputants but rather people who try to work with the disputants to resolve the conflict or transform it to transform it into something less destructive. Sometimes these intermediaries are official or "formal": professional mediators, arbitrators, judges, or other official actors. But often they are informal or unofficial: people who work outside official negotiations and mediation processes.

Following the main theme of this book, the chapters in Part II describe and analyze long lasting military conflicts with a multitude of actors involved on the ground as well as at various international levels (e.g., the UN, the EU, bilateral fora etc). The cases analyzed show the at times simultaneous application of formal and informal diplomacy and how long lasting military conflicts tend to attract third parties who partake in the conflict for reasons ranging from altruism to secondary gain interests. This is well illustrated in the classic case of Cyprus, but it is also evidenced in the ongoing conflict in Kashmir, the persistent tensions between China and Taiwan, and aid options for the Palestinian Authority.

The third part of this book consists of case analyses of economic and political conflicts where governments, multinational enterprises, UN organizations, specialized agencies (e.g., the World Trade Organisation) are called in or invite themselves into the conflict. Such multi-actor proliferation within conflicts can occur in sectors such as energy, energy transportation, and accession negotiations (e.g., to the WTO or the EU) where disputants often

increase in number and in organizational type (government, NGO, international organisation, and multinational enterprise).

While at their root almost all conflicts can be viewed through an economic or political lens, the cases studied in Part III are dedicated to conflicts that are strictly economic or political in nature, and arise because of the high stakes involved. These cases also show that economics and politics are difficult to separate. For example, while Russia's accession to the World Trade Organisation (WTO) is an economic question, it is highly politically charged while Turkey's accession to the EU is a political question with strong economic and socio-cultural implications. The same characterizations apply in the energy dispute cases examined. Regardless whether they revolve around natural gas or petroleum, at stake are not only long standing political arrangements, but also means for economic development. This is clearly illustrated by the Cuban oil case as well as the banana trade dispute. Therefore, this part is perhaps the most complex. There are the surface considerations – membership, drilling rights, market rights – but beneath these, the conflicts challenge an existing order and in doing so touch multiple official and unofficial stakeholders, who today are more adept at voicing their positions and working to influence outcomes.

PROJECT BACKGROUND

The idea for this book came about in the following way: the first author teaches a course titled “Management of organizational and institutional conflicts” at Sciences-Po, Paris as part of the Master of Public Affairs Programme (MPA). The second author, a graduate of the MPA, has specialized in international social and political policy analysis.

The objective of the Management of Organisational and Institutional Conflicts course is for students to develop systematic skills in diagnosing conflicts in organizations,

between organizations and within larger institutional settings, and then to identify solution sets for complex conflicts extending beyond simple bilateral approach.

In the MPA course, each student was asked to undertake an independent research project and to prepare a final paper that anticipates future trends within corporations, governments, civil society, international organizations and their external environments, as well as to interpret these trends with regard to what they imply for conflict management and negotiation behaviour.

Students were also asked to select a topic close to their own professional interests and useful for their own future career path. The topics should focus on an emerging future conflict or on an ongoing conflict. They should describe and analyze conflicts using methods like multi-stakeholder concepts, SWOT analysis, scenario building, and bargaining theory and apply them to a current conflict and concomitantly outline possible solutions to the analyzed conflicts.

Writing term papers as such does not constitute a good enough reason for publishing a book. The reasons for putting these papers into book form are three fold:

First, there is an increased focus on international conflicts and negotiations, particularly those with cross-boundary domains. The cases in this volume speak to this growing trend. In addition, case studies need to be added to the current literature in order to broaden the field, and finally there is growing need for case data that supports emerging theory on cross boundary negotiations.

By cross-boundary negotiations we mean a) negotiations between state and non- state actors, b) protracted military conflicts with third party interferences and c) negotiations of high complexity rooted in a multi-institutional context where international governance régimes do not yet exist or where boundaries remain porous.

INTENDED AUDIENCE

This book has been written for a wide-ranging audience.

First, the editors and authors hope that the book will be useful for the practitioners on the ground who face complex negotiations and conflicts with multi-actor characteristics, be they representatives of governments, international organizations, business or civil society. Much can be learned through comparison, analysis and narrative description of complex multi-actor negotiations.

Scholars in the field of negotiations and international conflict should also find in this book new ideas and new solutions to existing and sometimes malignant conflicts. The various case examples offer ample opportunities for theory building and also for classroom teaching. We are particularly thinking of graduate courses in international relations, global business and international negotiations.

The varied backgrounds of the authors and the very international character of the cases selected will also be useful for scholars involved in theory building and teaching who are looking for opportunities to expand the existing core literature with non-western case examples written by western and non-western negotiation researchers.

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INTRODUCTION

Raymond Saner

GLOBALISATION RESULTING IN THE INCREASING COMPLEXITY OF INTERNATIONAL RELATIONS

Globalisation has transformed the organisation of international relationships around the world, affecting the economic, social and political spheres of societies and citizens. It is characterised by a complex set of interconnectivities and interdependencies with an increasing number of actors vying to influence the outcome of these relationships. They lay competing claims to resources, markets, and legitimacy, and are engaged in activities traditionally defined as belonging within the domain of diplomacy.

As observed by Friedman:

Globalisation is not a phenomenon. It is not just some passing trend. Today it is an overarching international system shaping the domestic politics and foreign relations of virtually every country, and we need to understand it as such.¹

Or as Scholte suggested, globalisation involves “the growth of ‘supraterritorial relations’ among people.”² As part of the driving force behind the processes of globalisation, firms have been engaged in rapid expansion through mergers and acquisitions (M&A) and other forms of cooperative joint venturing, while at the same time intensify efforts to influence domestic and international policies in their favour. Increasingly, transnational

companies (TNCs) form cross-territorial alliances in order to coordinate their policy positions and to strengthen their lobbying effort vis-à-vis international regulatory and governance bodies.

In a similar fashion, nation-states are also engaged in fierce competition for political and economic influence. Assessing the geo-political situation since the second Iraq war, Parag Khanna states that a new global order has arrived which is no longer characterized by American hegemony but looks more like a geopolitical marketplace where different older and emerging power compete for influence³. Nation-states vie for economic gain and at the same time seek cooperation with other like-minded states in order to shape regulatory institutions in their favour. Countries also compete with each other to attract foreign direct investment (FDI), to gain market access for their national companies, and to

¹ Friedman, Thomas. *The Lexus and the Olive Tree: Understanding Globalisation*. HarperCollins. 2000 p 7

² Jan Aart Scholte, "Globalisation, Governance and Corporate Citizenship," *The Journal of Corporate Citizenship*, Issue 1, p.15~23, 2000

³ Parag Khanna, "Waving Goodbye to Hegemony." *New York Times Magazine*, January 27, 2006

attempt to protect their domestic markets through overt or covert trade barriers. Meanwhile, countries are also deepening their cooperation at standard and rule setting intergovernmental institutions (e.g. WTO, ITU) or within the context of regional economic integration (e.g. NAFTA, EU, FTAA).

Entering into these complex patterns of interaction and interdependencies are non- state actors who are gaining greater influence in policy debates. While economic objectives are driving transnational enterprises and the nation-states into collaborative competition – within the context of the WTO for instance – NGOs are adding their voice to policy debates by organising and lobbying across national boundaries in order to have a greater influence on international policy making. This trend has gained strong momentum, evidenced by the active involvement of NGOs in international cooperation for development, by their increasingly vocal criticisms of unfettered capitalism, by conflicts between indigenous groups with TNCs in regard to the exploitation of natural resources, and by the confrontation between citizen groups and their respective national governments on various socio-economic policy issues.

Faced with the growing economic and political interdependencies of markets and states, enterprises and governments have to cope with an environment characterised by fragmented relationships and growing complexities. They need to find ways to interact effectively with non-state "adversaries" such as NGO pressure groups and to transact efficiently with their own constituencies, be they clients or citizens, who request better, faster and broader services from governments and companies alike. The increasingly competent and well-networked NGOs monitor and evaluate the performance of governments and enterprise, demanding greater accountability and transparency of their actions. Most of all, NGOs and other civil society groups have learned to galvanise public opinion in order to successfully put

forward their own agendas and to effectively demand greater social and international solidarity.

Governments, transnational enterprises, and transnational NGOs are in need of constructive diplomatic expertise in order to manage the complexities and uncertainties of today's globalised world and in order to prevent the multitude of potential policy conflicts from erupting into violence and chaos.

THE MULTIPLICATION OF DIPLOMATIC ACTORS

Modern diplomacy, as defined by Satow, is “the application of intelligence and tact to the conduct of official relations between the governments of independent states.”⁴ Implicit in Satow's statement is the view that diplomacy is the exclusive domain of the Ministry of Foreign Affairs (MOFA). However, globalisation and democratisation have rendered the professional boundaries of diplomacy more porous and brought into question the territorial claims of traditional diplomats. Alternative diplomatic actors have emerged both inside and outside the state, and often act independently from the Ministry of Foreign Affairs. Diplomacy as a profession has undergone changes in terms of definition, qualification and role expectation of what a diplomat is or is not supposed to do.⁵

⁴ Definition given by Ernest Satow, see Lord Gore-Booth (ed), "Satow's Guide to Diplomatic Practice", Longman, 1979., pp 3.

⁵ For a more detailed overview of diplomacy's change of definition and practice see Raymond Saner, (2002), "Zur Kultur eines Berufs: Was ist ein Diplomat?", in Enrico Brandt, Christian Buck (eds) "Auswärtiges Amt: Diplomatie als Beruf", Leske & Budrich, Opladen, Germany.

Participation of non-state actors in foreign policy and international relations is a phenomenon that is more pronounced in industrial countries. In developing countries the distinction between internal affairs and foreign policy has increasingly been replaced by multi-actor participation in diplomacy, foreign economic relations, and public affairs.

This major development of emerging diplomatic activities outside the traditional prerogatives of the MOFA deserve greater attention and invite a rethinking of the definition of diplomacy, the role definition of diplomats, and the functions and task of MOFAs. Diplomats and civil servants of MOFAs are confronted with new actors, new agenda items and new working methods.⁶ They are thus caught with inadequate training and preparation. Adapting traditional diplomacy to the reality of contemporary diplomacy has become an urgent necessity.

The Proliferation of “Foreign Affairs Departments” at other Central and Provincial Government Ministries

Important ministries at the central government level responsible for specialised policies are increasingly engaged in policy dialogues with counterparts in other countries. With the growing use of international conferencing, these Ministries inadvertently challenge the traditional lead role of the MOFA in matters regarding state-to-state exchanges or participation at international standard setting fora. These specialised Ministries have gradually eroded the MOFA monopoly in handling foreign affairs and demand to be the leading agencies in their respective domain of competence, e.g. Ministry of Economic Affairs taking over the lead at the IMF, the World Bank (WB), the OECD, the Ministry of Telecommunication at ITU, Ministry of Labour at ILO, Ministry of Trade at WTO, etc.

Faced with this proliferation of diplomatic activities by other ministries, many MOFAs either try to block entry of other ministries into the international arena or gradually

accept playing a secondary role at international meetings. Other MOFAs have been successful in transforming their role from sole responsibility for foreign policy to becoming the overarching coordinator of inter-ministerial foreign policy formulation. This more consultative role allows specialised ministries to participate in the formulation of negotiation positions while at the same time leaving the MOFA diplomats formally in charge of national delegations at international meetings.

The trend towards decentralisation of power and devolution of competencies from the central state to provincial states has increased dramatically, especially within some members of the European Union. This may occur through extensive interpretation of the subsidiarity principle, or through direct devolution of power as demonstrated by the United Kingdom in 2001 when it devolved some state competencies from the central government to the regions of Scotland and Wales. This trend of greater regional/local autonomy has also led to greater involvement of regional and local entities in matters traditionally monopolised by central or federal governments. Newly empowered regional and local authorities initiate their own international ties and maintain separate mechanisms to satisfy their locally specific interests, be it economic, environmental or social.

Provincial governments, like the German Länder, opened representative offices in Brussels in order to influence decision making at the EU Commission and EU related institutions. The same process can be observed for non-EU countries like Switzerland whose larger cantons (provinces) also opened representative offices in Brussels even

⁶ Rik Coolsaet (1998), "The transformation of Diplomacy at the threshold of the new millenium", University of Ghent (Belgium), pp 3-5.

though Switzerland is not a EU member state. The participation of sub-national actors in international relations further complicates matters in regard to the consolidation of national foreign policy and constitutes an additional challenge for MOFAs.

The Emergence of Diplomatic Functions in Transnational Enterprises

Globalisation as measured by worldwide foreign direct investment flows is galloping ahead, as is transnationalization.⁷ Companies today are increasingly conducting business across OECD countries, newly emerging markets (Eastern Europe, China) or newly industrialized economies (South-East Asia, South America), and some of the industries have become transnational to a surprisingly large extent (see Table 1).

Table 1: Averages in Transnationality and Foreign Assets by Industry (1999)

Industry	Average trans-nationality (%)	Foreign Assets (Billion Dollars)	Foreign Assets as % of top 100 TNCs foreign assets
Food & Beverages	88.7	321	6.3
Pharmaceuticals	67.3	239	4.7
Electronics & Electrical Equipment	59.6	647	12.7
Petroleum	70.1	693	13.6
Motor vehicles	41.1	677	13.3
Chemicals	53.9	158	3.1
Total	63.4 5*	2'7 35	53.7

*Average

(Source: UNCTAD/Erasmus U. Database)

However, for several decades transnational companies have also been under pressure from many sides on a diverse array of issues. Doing business in countries like Russia, China, Japan or the Middle East requires specific country knowledge and business acumen which often cannot be managed by “best practice” recipes imported from the US or Western Europe.

⁷ According to United Nations Conference on Trade and Development, the degree of international involvement of a firm can be measured in various ways. The index of transnationalisation used by UNCTAD is a composite of three ratios namely foreign assets/total assets, foreign sales/total sales and foreign employment/total employment. UNCTAD, 1998, *World Investment Report: Trends and Determinants*. Geneva, 1998. pp 43.

In addition, increased globalisation has led to the development of a multitude of standards that govern business behaviour. It is no longer sufficient to only know the business and legal conditions practiced in a global company's headquarter country and those of host countries where its subsidiaries conduct business. Corporate reputation today hinges on a TNCs' overall performance including respecting social, environmental, human rights and ethical criteria. The proliferation of private certification and labelling schemes (for instance of tropical wood products or no-child labour production) and the growing attention paid to corporate responsibility bear witness to the power of such social and environmental demands and illustrate their potential impact on TNCs' competitive advantage in case of good compliance.

On the economic front, greater international efforts have been made to ensure fair competition, sustainable development and good governance. Multilateral and intergovernmental organizations are increasingly defining industry standards which form mandatory framework conditions for global companies where ever they may operate. Business decisions have to comply with such international standards regardless whether a global company is American, French or Japanese by origin.

Transnational enterprises are important non-state actors operating on a global scale in developed, developing and transition economies. Global managers are competent in managing business operations but do not necessarily know how to manage non-business stakeholders in all the countries in which they operate. These non-business stakeholders are pressuring the transnational enterprises to be more socially and environmentally accountable. Failure in dealing with these non-business related issues can easily lead to crisis, open conflicts, or missed business opportunities.

Given the need to deal more effectively with international and national regulatory bodies and to manage more successfully the various activist groups,

transnational companies have taken matters into their own hands and started "diplomatic" offensives in different settings and through different media channels. One recent example is the case of big business lobbying in United States Congress to grant PNTR (Permanent Normal Trade Relations) status to China.⁸ Another example is the establishment of the Trans-Atlantic Business Council (TABC)⁹ by major businesses from the United States and Western Europe as a forum to coordinate their positions regarding WTO and other trade related issues.

Increasingly, business communities put forward their own White Papers stipulating preferred policy positions and forming cross-border alliances through their multiple "embassies" (i.e., national subsidiaries) in order to promote their own agenda.¹⁰ MOFAs can hardly keep tabs on these parallel activities, let alone coordinate them!

⁸ To see more details on this case, please read Ian Urbina (2000), "The Corporate PNTR Lobby", *Multinational Monitor*, May, vol. 21(5).

<http://multinationalmonitor.org/mm2000/00may/urbina.html>

⁹ For more information, see www.tabd.com; for a background discussion of TABD's role see: Coen, David, Grant, Wyn (2000): "Corporate Political Strategy and Global Policy: A case study of the Transatlantic Business Dialogue (TABD)", London Business School, dcoen@lbs.ac.uk or University of Warwick, PORCB@titanic.csv.warwick.ac.uk

¹⁰ For an excellent analysis of lobbying influence on government function see: Coen, David; (1999);

"The Impact of U.S. Lobbying Practice on the European Business-Government Relationship", California Management Review, Vol. 41, Nr. 4, pp 27-44.

The Growing Participation of Transnational NGOs in International Governance and Economic Diplomacy

NGOs operate at multiple levels ranging from national civil society issues such as environmental protection, to the observation and investigation of possible human rights violations by global companies or foreign states. They often operate at national, regional and transnational levels focusing on economic, social and political issues.¹¹

Concerned with the negative impact of development on the environment and disadvantaged groups, NGOs challenge states on economic and business issues through civil protests, campaigns, negative ranking lists and other means. Thus, NGOs manage to stifle the ability of traditional sovereign actors to operate unimpeded, be this at a state-to-state level or within the sphere of multinational standard setting organisations.

NGOs are increasingly challenging and exerting pressures on transnational enterprises at home and in foreign markets, alike. Through campaigning and boycotts, for example, INFACT¹² has been exposing life-threatening abuses by TNCs and organising grassroots campaigns to hold corporations accountable to consumers and society at large. From the Nestlé's infant formula marketing of the 1970s and 1980s to today's boycott of Kraft Foods (owned by tobacco giant Philip Morris), INFACT has successfully won concrete changes in corporate policy and practice.¹³

Internationally, NGOs are also leaving their footprints. The Framework Convention on Tobacco Control (FCTC), an international treaty being negotiated by the World Health Organisation (WHO) member states since 2000,¹⁴ is one successful example of how a grassroots movement, through supraterritorial alliance (i.e. the Network for Accountability of the Tobacco transnationals – NATT) challenged the governments and international organisation into action.

The WHO FCTC opened for signature on 16 June to 22 June 2003 in Geneva, and thereafter at the United

Nations Headquarters in New York, the Depositary of the treaty, from

30 June 2003 to 29 June 2004. The treaty, which is now closed for signature, has 168 Signatories, including the European Community, which makes it the most widely embraced treaty in UN history. Member States that have signed the Convention indicate that they will strive in good faith to ratify, accept, or approve it, and show political commitment not to undermine the objectives set out in it. Countries that did not sign the Convention by 29 June 2004 but who wish to become a Party may do so by means of accession, which is a one-step process equivalent to ratification. The Convention became effective on 27 February 2005. Now that the treaty has been ratified, it greatly limits the business options for the tobacco industry and TNCs such as Philip Morris.¹⁵

¹¹ for a in-depth discussion of NGOs political responsibility, see Lisa Jordan, Peter van Tuij (1997), "Political Responsibility in NGO Advocacy: Exploring emergin shapes of global demoncracy", SIT, www.sit.edu/global_capacity

¹² INFAC, founded in 1977, is a national grassroots corporate watchdog organisation in the USA. For more information on Infact, see www.infact.org

¹³ "GE can be Beat: An Interview with Kathryn Mulvey", *Multinational Monitor*, July/August, vol. 22(7 & 8). Also available on line: <http://multinationalmonitor.org/mm2001/01july-august/julyaug01interviewmulvey.html>

¹⁴ For more information on FCTC, please check the following web sites: <http://www.treatycheck.org> and <http://www.who.org>

¹⁵ World Health Organization 2003, updated reprint 2004, 2005

The Internet has changed greatly the power relationship between state actors, transnational enterprises and transnationally active NGOs (T-NGO). When searching the World Wide Web for "stakeholders" related web sites, more than 10.6 million entries can be found on *www.Google.com* alone. The Internet has become one of the most powerful and affordable tools for making strategic alliances amongst T-NGOs and voluntary groups around the world. They can exert pressure on governments and on global companies demanding more information and more transparent government policies and business practices. At the same time, they are using IT to exert influence deep into the organisational structures of governments and global companies.

Most significantly, NGO communities are putting forward their alternative development models, thereby directly challenging policy formulas such as the so-called Washington Consensus.¹⁶ Internet based virtual communities allow NGOs to pool resources and information on things happening on the ground. Making use of their information gathering capacity and sophisticated policy analysis capability, transnational NGOs are increasingly active in the international policy arena and demand their rights for supraterritorial representation thereby challenging the MOFAs' abilities to coordinate national economic policy at international fora.

AN URGENT NEED TO REDEFINE "DIPLOMACY"

Diplomacy evolved over time, as did its definition and the professional identity of diplomats.¹⁷ This evolution is also true of diplomacy's recorded history,¹⁸ which goes back to ancient Greece. Important contributions to the diplomatic method have been made throughout history, particularly during the period of the Italian city-states, in France before and after the French revolution, and in England beginning with industrialization and continuing through

the expansion of its empire. Systematic contributions have been made by the US especially after World War II with the start of large-scale social science research aimed at analysing and understanding the behaviour of international negotiators.¹⁹

Modern diplomacy has often been equated with the era following the Westphalian peace negotiations. The term “Westphalian System” describes

"The post 1648 system of international relations in which “states – secular, sovereign, independent, and equal – are the members, and stability is preserved by the balance of power, diplomacy and international law.”²⁰

As recent history teaches us however, conflicts might again involve non-state actors. This has been the case since 2001 with the attack on the World Trade Centre in New York

¹⁶ Defined as being the dominant beliefs and prescriptions resulting from policy harmonisation between the US government and the Bretton Woods institutions (IMF and World Bank) also called in France as “Pensée Unique”, for an example see: Raymond Saner (2000), “The Impact of Policy and Role of Donor Agencies on Small and Medium-sized Enterprise (SME) Assistance Projects in Russia”, in Paul Trappe (Ed.), *Social Strategies*, pp. 331-346, Peter Lang Publ., Berne.

¹⁷ Saner, Raymond; (2002) *ibid.*

¹⁸ Saner, R., 1991, What History Teaches Us about Negotiation Behavior, (in Dutch), *Negotiation Magazine*, vol. IV (2), and in more depth in Saner, R., 2008, (3rd Ed.), *The Expert Negotiator*, Kluwer Law Publ., The Hague.

¹⁹ Another source book on the history of diplomacy is Lucien Bély's book *L'invention de la diplomatie: Moyen Age- Temps modernes*. Presses Universitaires de France, 1998.

²⁰ Berridge, G.R.; James, Alan; (2001). *A Dictionary of Diplomacy*. Palgrave, New York. Pp.250

involving a state (US) and its allies, facing a non-state actor (Al-Qaeda) working world- wide through various networks and alliances. As Paul Meerts comments: “This Eurocentric character of the Westphalian system might not fit the globalised world of today and tomorrow.”²¹

In addition to national states, there are now also sub-national actors (e.g. regions like the German Länder), supranational actors (e.g. EU, NAFTA) and non-state actors (e.g. NGOs and enterprises), who all partake in the shaping of international relations.²² Reviewing the evolution of diplomatic practice, Wiseman adds a third concept to the traditional diplomatic methods of bilateralism and multilateralism, that of *polylateralism*, which he defines as follows:

“The conduct of relations between official entities (such as a state, several states acting together, or a state-based international organisation) and at least one unofficial, non-state entity in which there is a reasonable expectation of systematic relationships, involving some form of reporting, communication, negotiation, and representation, but not involving mutual recognition as sovereign, equivalent entities.”²³

Wiseman’s concept of polylateralism captures the broadening interface between the Ministries of Foreign Affairs and their respective state and non-state counterparts. In light of the proliferation of actors involved in international relations and diplomatic activities, Melissen²⁴ offers a succinct definition of contemporary foreign policy and diplomacy:

“[Diplomacy] is defined as the mechanism of representation, communication and negotiation through which states and other international actors conduct their business.”

Melissen and Wiseman's definitions of diplomacy capture the post-modern nature of diplomacy that is characterized by the simultaneous participation of multiple state and non-state actors.

While greater representation and participation of diverse interest groups leads to a democratisation of the political processes at the national and global levels, it also makes diplomacy and international relations vulnerable to fragmentation and possible outbreaks of conflict due to potential paralysis caused by too many state and non-state actors who often harbour mutually exclusive policy goals.

THE CO-EXISTENCE OF DIVERGENT DIPLOMATIC ROLES IN THE INTERNATIONAL ECONOMIC POLICY SPHERES

Looking at the developments in the international policy spheres more closely, one notices a further broadening of actors involved in international relations. Taking as an example

²¹ Paul Meerts (in press), "Peace vs. Justice: Negotiating Forward and backward looking Outcomes", Clingendael, The Hague, 2002

²² Coolhaet, Rik, (1998); *ibid*

²³ Wiseman, Geoffrey (1999): "Polylaterals and New Modes of Global Dialogue." Discussion Paper No. 59, Diplomatic Studies Programme, University of Leicester. p 11

²⁴ Melissen, Jan; (1999) ed. *Innovation in Diplomatic Practice*, McMillan Press, London, pp.xvi- xvii.

international economic policy making the following developments can be observed. In addition to state actors, transnational companies and T-NGOs are more actively participating in international economic relations. They not only interact with traditional state actors but also engage each other directly on issues pertaining to international economic policy.

The new entrants to the diplomatic arena represent different groupings and organisations of local, national and international actors pursuing convergent and divergent interests. These multiple forces co-exist and exercise different forms of diplomatic influence to achieve their objectives. Commenting on the increase of non-state actors, Langhorne²⁵ states that:

Private organizations are developing their own diplomacy both between themselves and between actors in the state system; and the way they have been doing it is remarkably reminiscent of the early days of state self representation.

The proliferation of diplomatic roles and actors is indeed stunning. Reflecting on the role and function of non-state actors, Burt and Robinson²⁶ point out that the international landscape is crowded with multinational corporations and NGOs that directly impact international relations, and consequently, the conduct of diplomacy.

For instance, focusing on the economic sphere at international level, these newly emerged diplomatic functions and roles of the various state and non-state actors could be categorised in the following manner:

Table 2: Divergent Postmodern Diplomatic Roles in Economic Sphere

	<i>Functions</i>	<i>Roles</i>
<i>State Actors</i>	• Economic diplomacy	• Economic diplomats
	• Commercial diplomacy	• Commercial diplomats

<i>Non-State Actors</i>	• Corporate diplomacy	• Corporate diplomats
	• Business diplomacy	• Business diplomats
	• National NGOs	• National NGO diplomats
	• Transnational NGOs	• Transnational NGO diplomats

Examples of multi-actor diplomatic roles in the spheres of Economic and Commercial Policy

Faced with the complexities of multilateral standard setting organizations responsible for economic policies (e.g., the WTO, the IMF, the OECD), many governments have broadened the participation of ministries specialising in economic and financial matters, thereby decreasing or neutralising the influence and role of MOFAs. For instance, in 1962

²⁵ Langhorne, Richard; (1998); "History and the Evolution of Diplomacy" in Kurbalija, Jovan: *Modern Diplomacy*. Mediterranean Academy of Diplomatic Studies, University of Malta, pp 147- 162. p. 158.

²⁶ Burt, Richard; Robinson, Olin (1999); "Diplomacy in the information age." Discussion Paper Nr. 58, Diplomatic Studies Programme, University of Leicester. p. 17, 42-43.

the US government centralised decision-making power with respect to global trade negotiations by creating a new executive office of the president, the Office of the United States Trade Representative (USTR) – active first in the GATT and now at the WTO. In addition, the US government created an interagency command group based in Washington to improve policy coordination during the GATT Kennedy Round. This effectively limited the complexity, the inter-departmental policy disputes and any external influence exerted by members of Congress and various lobbying groups (e.g. farm and food processing industry).²⁷

Efforts by specialised ministries to conduct policy related international negotiations and to influence the structure and mechanisms of global governance architecture have eclipsed the previous prominence of MOFAs in economic and trade arenas. The rise of this non-traditional genre of multi-ministry international diplomacy is apparent in Geneva, where the embassies of many industrialised countries to the WTO are staffed with more officials than the bilateral embassies to Switzerland in Berne. The greater number of staff is mostly due to an ever-increasing number of non-MOFA diplomats and government officials. Economic diplomacy conducted by MOFA or other government ministry officials has been defined as follows:

Economic diplomacy is concerned with economic policy issues (e.g., the work of delegations at standard setting organisations such as the WTO in Geneva and Bank for International Settlements in Basle). Economic diplomats also monitor and report on economic policies in foreign countries and advise the home government on how to best influence these. Economic diplomacy employs economic resources, either as rewards or sanctions, in pursuit of a particular foreign policy objective. This is sometimes called “economic

statecraft.”²⁸

Governments are also keen to support national economic development by providing support to their own enterprises, for instance in the form of legal assistance, export advice, export incentives, and backstopping when needed. Such support includes helping national enterprises establish subsidiaries in other markets. At the same time, their function can also include support to foreign enterprises interested in investing in the respective country.

Commercial diplomacy describes the work of diplomatic missions in support of the home country's business and finance sectors in their pursuit of economic success and the country's general objective of national development. It includes the promotion of inward and outward investment, as well as trade. Important aspects of a commercial diplomat's work is supplying information about export and investment opportunities and organising and helping to act as hosts to trade missions from home.²⁹ In some cases, commercial diplomats could also promote economic ties through advising and supporting both domestic and foreign companies in investment decisions.

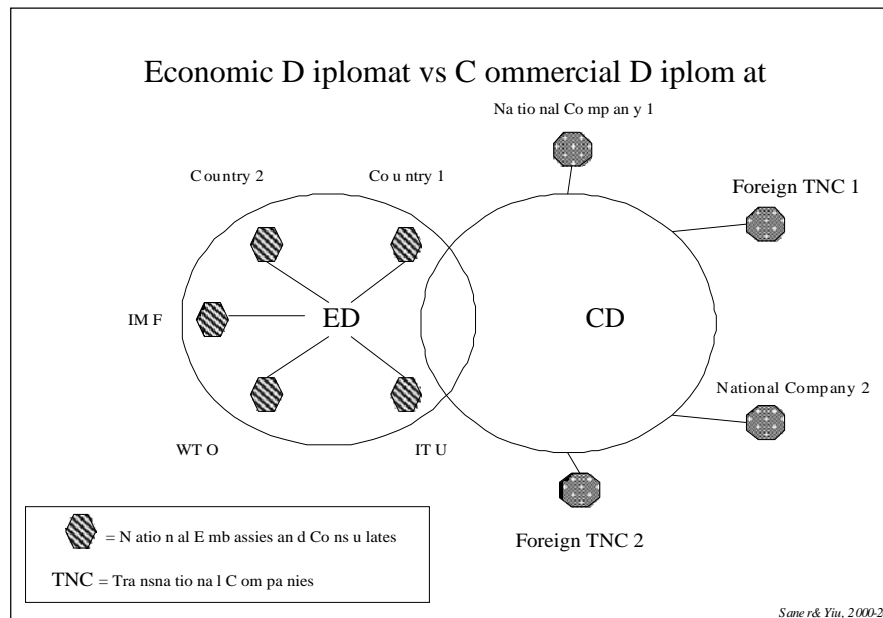
²⁷ Donna Lee, (2001), “Endgame at the Kennedy Round: A Case Study of Multilateral Economic Diplomacy.”

Diplomacy & Statecraft. Vol. 12, No. 3, pp 119-120.

²⁸ For more details see G.R.Berridge, Alan James; *A Dictionary of Diplomacy*. Palgrave Publ. (formerly Macmillan Press Ltd), Hampshire, UK, 2001, pp 81.

²⁹ Thomas Friedman, *The Lexus and the Olive Tree: Understanding Globalisation*. HarperCollins, pp 7, 2000. pp 38-39

The difference between *economic diplomacy* and *commercial diplomacy* can best be illustrated in Figure 1, below:



Recognising the importance of international trade and FDI to national economic development, governments have stepped up their efforts in strengthening their commercial representation in major trading partner countries. Commercial diplomats offer both services in this important sphere of diplomacy. They are either civil servants and specially trained diplomats, or representatives of chambers of commerce seconded to national Embassies. In addition to the traditional function of commercial attachés, para-statal organisations or public organisations have been given mandates to expand their services, coverage and presence abroad in order to support trade expansion and to conduct commercial diplomacy.³⁰

Diplomatic Functions and Roles within Multinational Enterprises

In order to succeed and ensure the sustained economic viability of their investments, transnational enterprises

must draw on competencies that allow them to manage multiple stakeholders at home and abroad. Faced with these challenges, global companies need to acquire greater diplomatic capacities and competencies in handling both the internal stakeholders and the external non-business stakeholders. Experiences have shown that the latter could be highly problematic for multinational companies when poorly or

³⁰ For a more in-depth treatment of commercial diplomacy see O. Naray “Commercial Diplomacy: A Conceptual Overview, Conference Paper, 7th World Conference of TPOs –The Hague, The Netherlands, 2008

incompetently handled. This is well illustrated by the legal case that large Western pharmaceutical companies started and lost against the South African government on patent infringement issues in the context of treating AIDS patients with generic drugs.

The diplomatic function within a multinational company is to ensure the continuation and structural cohesion of its extended network of headquarter and subsidiaries companies.³¹ This function could be divided into two, namely, that of corporate diplomacy and of business diplomacy.

*Corporate diplomacy consists of two organizational roles considered to be critical for the successful coordination of a multinational company, namely that of a country business unit manager who should be able to function in two cultures: the culture of the business unit, and the corporate culture that is usually heavily affected by the nationality of the global corporation”; and that of a corporate diplomat who as a home country or other national is impregnated with the corporate culture, multilingual, from various occupational backgrounds, and experienced in living and functioning in various foreign cultures. These two roles are essential to make multinational structures work, as liaison persons in the various head offices or as temporary managers for new ventures.*³²

Business diplomacy, meanwhile, aims to make the external environment of its subsidiaries conducive for business activities. Demands from local communities regarding corporate conduct (present, past, and future) limit the range of freedom behind corporate behaviour. Incompetently managed external constituencies and pressure groups could quickly result in millions of dollars

of costs (e.g. settling of damage claims) or lost business opportunities.

Traditionally, big enterprises hire former ambassadors or state secretaries (in the US) to promote business contacts and to obtain lucrative contracts. However, business diplomacy extends beyond the domain of public relations and business contacts. It deals with on the one hand the communities and consumer groups at the grassroots level, and on the other with the international community. Civil society actors are far more fragmented than states or transnational enterprises. Nevertheless, civil society organisations can create large challenges for transnational enterprises. Hence, business diplomacy can be defined as follows:

Business diplomacy pertains to the management of interfaces between the global company and its multiple non-business counterparts and external constituencies. For instance, global companies are expected to abide by multiple sets of national laws and multilateral agreements set down by international organizations such as the World Trade Organization (WTO) and the International Labour Organization (ILO). On

³¹ An example of cross-country divergence of business practice are the sources leading to labour turnover which vary considerably between countries, see for example: Raymond Saner, Lichia Yiu (1993), "Coping with Labour Turnover in Taiwanese Companies", *The American Asian Review*, Vol. XI, No. 1, Spring 1993, pp. 162-195.

³² Hofstede, G., 1991, *Cultures and Organizations: Software of the Mind*, London: McGraw-Hill, p.213.

account of a global company, business diplomats negotiate with host country authorities, interface with local and international NGOs in influencing local and global agenda. At the firm level, they will help define business strategy and policies in relation to stakeholder expectations, conduct bilateral and multilateral negotiations, coordinate international public relations campaigns, collect and analyse pertinent information emanating from host countries and international communities.³³

Figure 2 illustrates the contrasting functions between the *corporate diplomat* and the *business diplomat* regarding their diplomatic space.

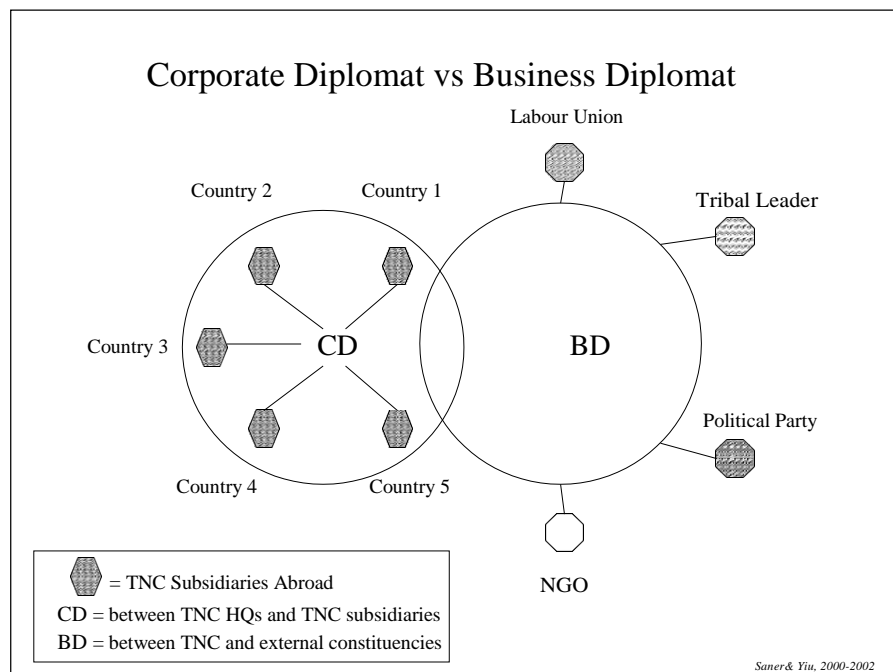


Figure 2: Corporate Diplomat vs Business Diplomat

Diplomatic Function and Roles within Non-Governmental Organisations

There are many areas in which NGOs are active, and a

distinction must be made between NGOs acting within national boundaries and those operating on an international level through their own foreign branches and/or through alliances with like-minded T-NGOs. Economically oriented NGOs focus on economic policy, international economic development and global business practice. NGO diplomacy may be viewed as follows:

³³ Raymond Saner, Lichia Yiu, Mikael Sondergaard, (2000), "Business diplomacy management: a core competency for global companies." *Academy of Management Executive*, Vol. 14, No.1, pp 80-92

National NGO Diplomacy. National economic NGOs representing civil society active in the economic sphere consist of various constituencies ranging from consumer protection, and anti-corruption to shareholder groups and environmentalists.

The number of national NGOs is growing fast partially due to the fact that the public now has greater access to information and stronger influence on corporate governance. Their voice and opinion can no longer be ignored by the holders of political and economic power. The recent case of bottle poisoning by Coca-Cola soft drink products in Belgium is an example. Being without in-house competence in business diplomacy, Coca-Cola Inc. missed out on the opportunity to respond in time to a request for clarification and remedial action by various NGOs ranging from consumer protection groups, journalists, and political activists to concerned parents in Belgium. Public outrage in Belgium affected Coca-Cola's business and led to millions of dollars of lost business throughout Europe. In addition, Coca-Cola's reputation suffered serious setbacks illustrated by this loss of sales both within and outside the country in which the problem occurred. A year later, the then CEO of Coca-Cola was asked to resign.

Transnational NGO Diplomacy organises advocacy events and lobbying activities at cross-border levels. It operates at international levels and also through transnational NGOs (T-NGOs) such as the World Wildlife Fund and Greenpeace, creating for instance coalitions against the WTO, WEF, IMF or transnational enterprises. T-NGOs propose their own policy solutions in the international arena, for instance during the multilateral negotiations on the Kyoto Protocol

agreement (climate change), the debt rescheduling of least developed countries at the IMF, or block the negotiation of a multilateral convention on foreign investment at the OECD. They are also involved in implementing technical cooperation projects in developing and transition economies thereby complementing, at times even substituting, national governments. In addition, they offer cutting edge research in areas crucial for international cooperation and crisis management.³⁴

In contrast to national NGOs, T-NGOs actively seek ways to influence the agenda of international governance bodies by putting forward their policy recommendations and by lobbying in the corridor of power. The dialogue between major transnational NGO's and the World Bank during recent annual World Bank conferences is one example. Based on their domain expertise, these non-state actors have taken the lead in many international fora and narrowed the range of operational freedom of traditional diplomats. Transnational economic NGOs can be defined as follows:

³⁴ For an excellent example of innovative research in conflict prognosis, see Luc van de Goor, Suzanne Verstegen (1999) "Conflict Prognosis: Bridging the Gap from Early Warning to Early Response: part 1 & 2, Netherlands Institute of International Relations, Clingendael, The Hague.

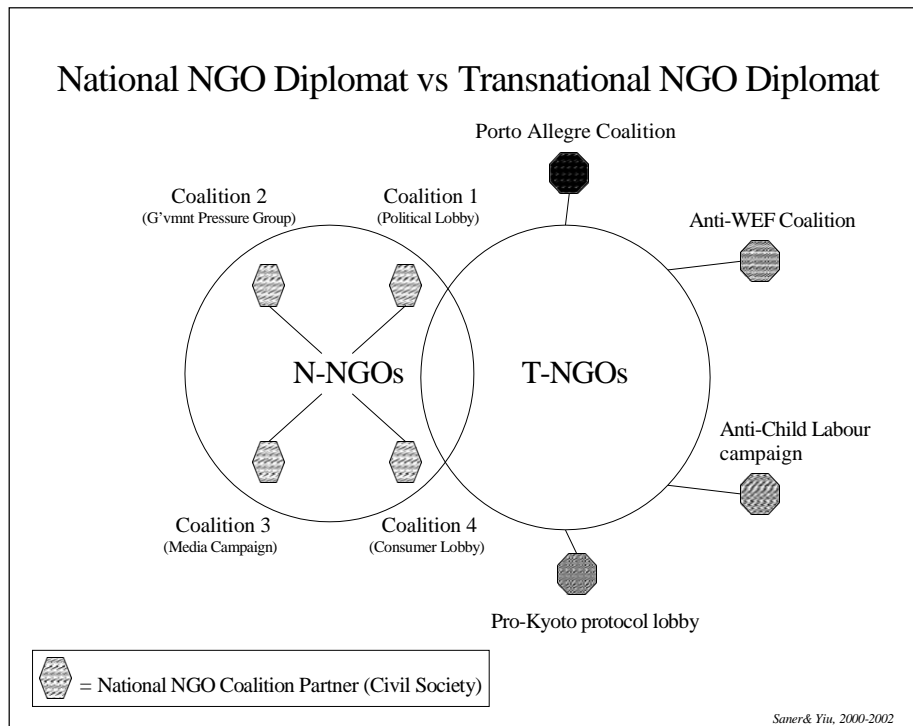


Figure 3: Territorial spaces for the advocacy of the National NGO diplomat and Transnational NGO diplomat

To give an example of the complexities of post-modern diplomacy and the growing importance of NGOs, Finn³⁵ cites the following statement attributed to US Deputy Secretary of State, Strobe Talbott:

“In Bosnia, nine agencies and departments of the US government are cooperating with more than a dozen other governments, seven international organisations and thirteen major NGOs ...to implement the Dayton Accords.”

Viewed from this perspective, it appears necessary that different actors in the enlarged sphere of contemporary diplomacy acquire additional competencies

or domain expertise to engage constructively in international economic policy dialogue. Conversely, it should also become increasingly possible that MOFAs and their diplomats adapt their traditional roles and functions from being a more inward looking, exclusive and secretive

³⁵ Finn, Edward. "Internatinal Relations in a Changing World: A New Diplomacy?", *Perceptions*, June-August, 2000 pp. 144-145.

actor to becoming a more reachable, outgoing and inclusive one constantly in search for possible inclusion of others, be they state (other ministries) or non-state actors (business diplomats and transnational NGO diplomats).

DIFFERENTIATING THE SIX CONTEMPORARY DIPLOMATIC ROLES IN THE SPHERE OF INTERNATIONAL ECONOMIC POLICY

Regardless of the affiliation of different "diplomats," their primary task is to safeguard the interest of their constituencies and to influence the outcome of transactions between themselves and other parties. Governments, global companies and transnational NGOs need to uphold the economic and business interests of their respective clients, be these the state, home-based global enterprise, or – increasingly – the interests of national civil society representatives representing specific localities and communities (NGOs, for example). To forestall potential confrontations, the government officials and business representatives need to adopt a two-way (participatory) approach to conflict resolution and feel more comfortable in constructive economic policy dialogue. Despite this, divergence exists in the roles and functions of the six primary postmodern diplomatic roles, identified as corporate, business, transnational enterprise, domestic civil society and transnational civil society.

National State Actors

The goal of economic diplomats is to competently influence multilateral economic policy by coordinating specialised ministries, by shaping the negotiation process at economic standard setting organisations, and by constructively including non-state actors as deemed useful and appropriate. The goal of commercial diplomats is to open foreign markets for their companies by influencing the economies of foreign governments and by facilitating the easy entry of their companies into foreign markets. They should also be available for facilitation in cases of

conflict of interests with foreign business or non-business stakeholders.

Figure 4 defines the different tasks of an *Economic Diplomat* and a *Commercial Diplomat*.
(next page)

Transnational Enterprise Actors

Business diplomats, and to a lesser degree corporate diplomats, should seek to identify new business opportunities in foreign markets and safeguard the corporate reputation and business sustainability within specific countries and localities. They strive to influence economic and political decision makers and liaise with the various national, foreign and transnational NGOs and other civil society groups who may have concerns about the business conduct of their company. They have to develop social networks encompassing not only potential business partners but also other social partners in order to promote the

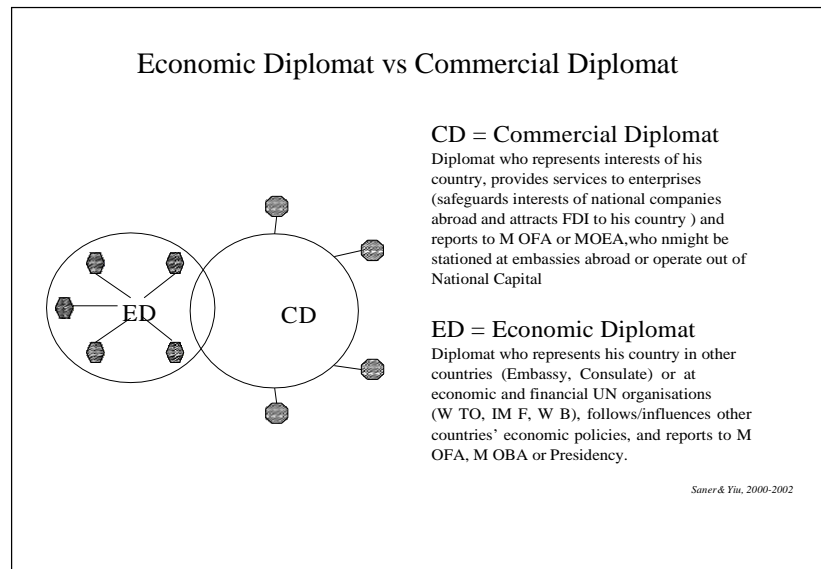


Figure 4: Functional difference between Economic Diplomat and Commercial Diplomat

corporate standing of their company in the non-business communities of the various host countries in which their company is active.

The diplomatic space in which a *business diplomat* operates is very different from that of a *corporate diplomat*. Their task differences are presented in Figure 5 (next page).

Transnational Civil Society Actors

NGOs and other civil society actors active in the field of economic policy need to understand the policy-making processes of central government, particularly within the specialised ministries in charge of economic policy. They need to understand and assess the extent of impact which international economic agreements have on a national government's freedom of action. At the same time, they need to seek partnership arrangements with business in order to promote employment and resolve social or

environmental issues. It would be useful for these actors to understand how enterprises function, how goods and services are produced, and how ownership and management affects the decision making process within key companies.

At the international level, T-NGOs follow closely the treaty-making process in crucial international standard setting organisations. They coordinate their advocacy campaigns with related T-NGOs in other key countries. Forming such cooperative relationships and alliances on specific economic issues provides T-NGOS with a power base, which helps them co-determine the outcome of multilateral negotiations.

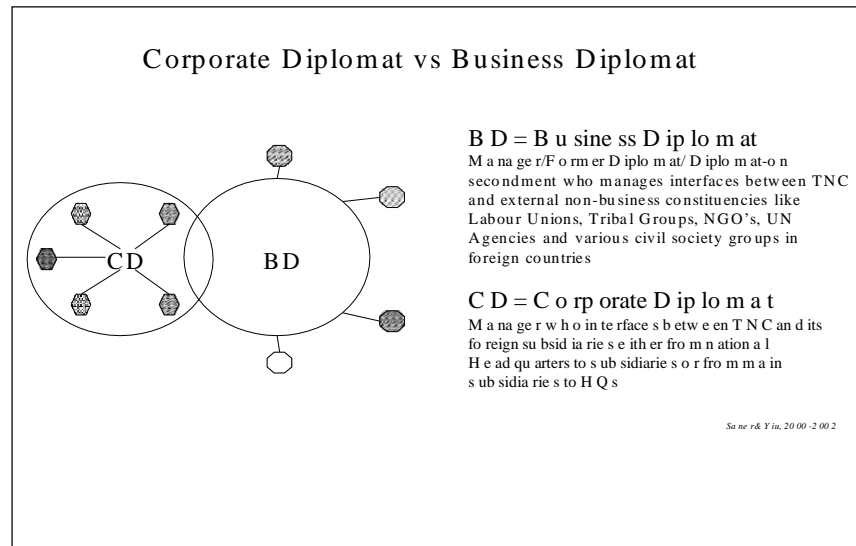


Figure 5: Task Difference between Corporate Diplomat and Business Diplomat

COMMON TASKS OF ALL CONTEMPORARY DIPLOMATS

In safeguarding the economic and development interests of their respective constituencies, contemporary diplomats need to fulfil a common set of basic objectives and tasks, aiming to:

- Influence political, economic and social policies to create the right conditions for economic development taking into account the needs and aspirations of other stakeholders.
- Work with rule-making international bodies whose decisions affect international trade and financial regulations.
- Forestall potential conflicts with foreign governments, NGOs, and various economic actors thereby aiming to minimize political and economic risks.
- Use multiple international fora and media channels to

safeguard the image and reputation of their own country, enterprise and NGO ("reputation capital").

- Create social capital³⁶ through dialogue with all stakeholders who might be impacted by the process of economic development and globalisation.
- Sustain credibility and legitimacy of their representative bodies in the eyes of the public and their own communities.

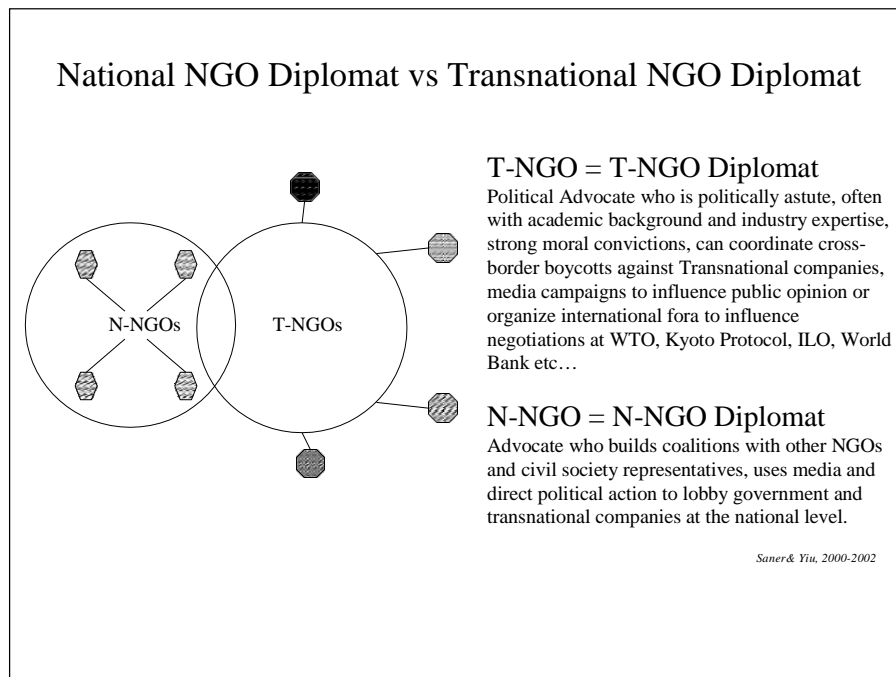


Figure 6: Task differences between National NGO Diplomat and Transnational NGO Diplomat

³⁶ Social capital refers to the ability of actors to extract benefits from their social structures, networks, and memberships (see Partha Dasgupta, Ismail Serageldin (Eds). *Social Capital: A Multifaceted Perspective*. The World Bank, Washington. 2000

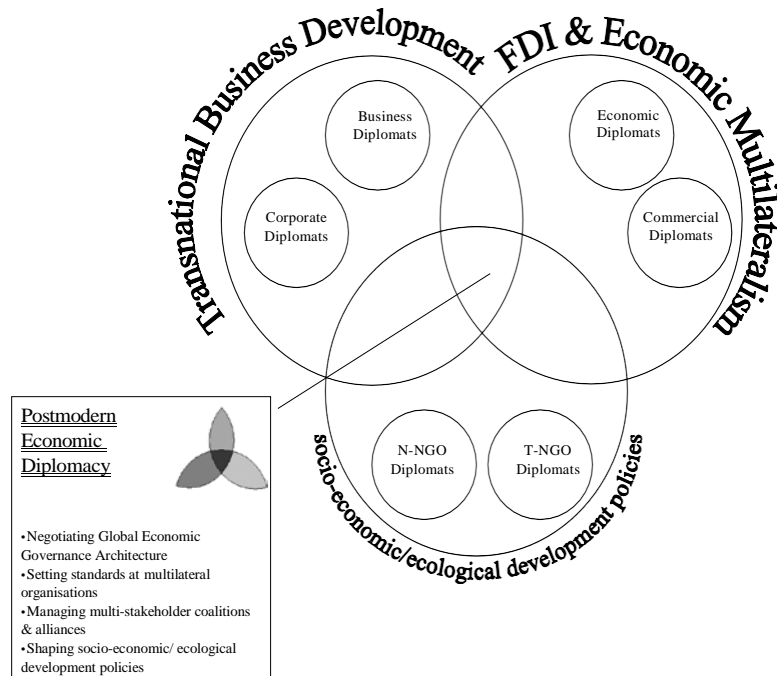


Figure 7: Common Tasks of all Diplomats

All six types of diplomats need to be competent in interfacing with their respective stakeholders and customers (governments, companies, civil society), conduct bilateral and multilateral negotiations, coordinate international public relations campaigns, collect and analyse pertinent information emanating from host countries and international communities. They need to scan the environment and reach out to the opinion makers of the respective communities, societies, and/or international communities. In addition, they need to gain the confidence of those who could influence the results of their mission. Most of all, these contemporary diplomats will need to adopt an outward looking mindset and to enlarge their role repertoire in representation and in diplomatic interactions.

STATE AND NON-STATE ACTORS' STRATEGIES
AND TACTICS IN CO-SHAPING INTERNATIONAL
POLICY IN GENERAL

As stated by Brian Hocking, diplomacy is increasingly becoming an activity concerned with the creation of networks embracing a range of state and non-state actors focusing on

the management of issues demanding the application of resources in which no single participant possesses a monopoly.³⁷

Applied to the practice of international policy in general, it has become difficult to understand how this multiplicity of actors influence policy-making, shape the policy making process, and leave their imprint on the final versions of negotiated agreements and conventions. In addition, consideration must be given to which actor is impacting other actors and the final agreements, and how.

Hence, international policy in the 21st century is best described through a multi-stakeholder model that incorporates the different international actors in a coequal manner, and where agenda-setting is a major tool for leveraging power vis-à-vis other stakeholders. Faced with multiplicities of actors, and increasingly complex and interdependent issues, scholars studying the multi-stakeholder process are searching for more encompassing concepts in order to make sense of the perceived multi-stakeholder complexities.

One attempt to explain the appearance of multi-stakeholder actors is the Punctuated Equilibrium perspective,³⁸ which states that policy changes occur as an answer to exogenous events, particularly in macro-politics. This leads to the (re)definition of issues, which is the point where agenda setting sets in. The different stakeholders will then exploit the political opportunities created by external shocks and/or internal crisis as they try to frame the issue according to their actualised interest.

While these theoretical explanations appear well founded, the model is missing the specifics of the influencing processes, particularly in regard to I-NGOs.

THE MULTI-STAKEHOLDER MODE

Looking at the process of how international policy making occurs and unfolds, a classification is needed to better understand the actors involved in this complex decision

process. Four broad groups of stakeholders constitute and shape the global governance of international policy-making: governments, TNCs, I-NGOs and Intergovernmental Organisations (IOs). IOs are also included here since they “provide an institutional umbrella for policy formation by mediating between the various stakeholders,”³⁹ while at the same time being stakeholders in the global governance process of international economic policy making.

In order to analyse the quadrilateral relationship between these groups, it is important to define who the stakeholders are and for whom they speak. In fact, it is mostly the last three stakeholders, all Non-State Actors (NSAs) in the broad sense of the term, who defy the realist framework of international relations as being a purely state-centric affair.

³⁷ Hocking, B. *Multistakeholder Diplomacy: foundations, forms, functions and frustrations*. International Conference

on Multistakeholder Diplomacy, Malta, February 2005. p.2

³⁸ Baumgartner, F. R. and Jones, B. D. *Agendas and Instability in American Politics*. 1993

³⁹ Reinicke, W. H. *Trilateral Networks of Governments, Business; and Civil Society: The Role of International Organizations in Global Public Policy*, 1999 p 13

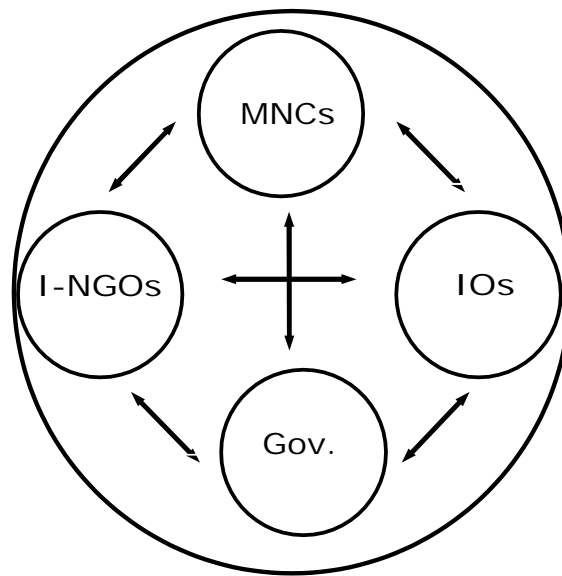


Figure 1 Stakeholder Interaction

TNCs, I-NGOs and IOs are different types of non-state actors (NSAs). To differentiate between these types of NSAs, scholars have used various and often inconsistent definitions. A common way to distinguish between TNCs and I-NGOs is to argue that the former are profit oriented thus pursuing instrumental and commercial interests, while I-NGOs are motivated by values rather than material concerns, thus pursuing normative interests⁴⁰. Sadoun further emphasises the existence of a *permanent structure with headquarters, (paid) employees, specific training and financial independence* as NGO “must-haves”⁴¹. This definition is sufficiently precise since TNCs and NGOs at times have converging instrumental and normative interests.⁴²

For instance, fundraising activities by traditional NGOs’ have become increasingly commercialised, and

some of their confrontations against other NSAs or governments are often carefully staged to generate maximum attention in order to attract new members and gain PR visibility. In contrast, a good number of business groups have established

⁴⁰ Keck, M. E. and Sikkink, K. *Transnational advocacy networks in international and regional politics*. 1998.

⁴¹ Sadoun, B. 'Political Space for NGOs in UN World Summit Processes', 2007 (p. 2).

⁴² Sell, S.K. and Prakash, A. 'Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights' 2004 pp. 148-149

associations and foundations, which are registered as “not-for-profit” giving rise to the emergence of a “philanthropic industry” over the last few years. Despite the fact that NGOs and TNCs may differ in terms of their interests, they might at times use similar approaches to the multi-stakeholder environment of the international economic policy arena. Sell & Prakash, for instance, show that the similarities in strategic and tactical behaviour between TNCs and NGOs “far outweigh their differences.”⁴³

STRUCTURAL COMPONENTS OF NSAs

NSAs dispose of a structural and a consequential component.⁴⁴ The structural component encompasses the legal and functional framework of the organisation. The consequential encompasses its intentions and actual activity. The NGO status of a given organisation is determined in terms of both components. The United Nations, for example, does not make a clear distinction between profit-seeking and not-for-profit organisations when attributing consultative status of NSAs at ECOSOC.

IOs are organisations of international character focusing on intra-state cooperation, which need to fulfil certain legal conditions in order to be recognised. IOs serve regulatory and governance purposes on an intergovernmental level and are key hosts of international policy deliberations. However, as Cronin has shown⁴⁵, a debate has erupted on the transnational aspects of IO-related activity as many scholars consider that intergovernmentality is no longer the only source of IOs’ authority. Due to changing interests, states have started not only to permeate territorial boundaries but to actually transcend them. For this reason, there has been a gradual tendency for the agendas of IOs and I-NGOs to overlap and adapt to each other over the last decades.

Although they are two separate types of actors, the two stakeholders have often been lumped together by non-specialists. However IOs have been very reluctant to let I-

NGOS take part in their activities, and only in the 1990s have rules been eased regarding eligibility to attend events, such as World Summits (Rio, Cairo, and Durban) and their preparatory regional meetings. For quite some time IOs excluded I-NGOs on the grounds that they were not factually accountable to any constituencies since I-NGOs executives are not democratically elected by populations or have a clearly defined membership. IOs did not consider I-NGOs sufficiently transparent as to how their budget was spent or the source of their funding. Similar reservations have been made by governmental actors but, NSAs,, I-NGOs, and TNCs seemed to have succeeded in penetrating the inner spheres of global governance, indirectly legitimizing each other's role in a way labelled as an "unholy alliance" by Niggli & Rothenbühler⁴⁶.

SOURCES OF INFLUENCE OF NSAs AND SAs

NSAs and State Actors (SAs) draw on different sources of influence which they use to shape the governance process of international policy making.

⁴³ Ibid. (p. 144).

⁴⁴ Sadoun 2007.

⁴⁵ Cronin, B. (2002). *The Two Faces of the United Nations: The Tension between Intergovernmentalism and Transnationalism*. 2002.

⁴⁶ Niggli and Rothenbühler 2003 (p.2).

STATE ACTORS

Governmental policies toward NSAs by democratic states are subject to substantial change every time government representatives are voted out of office or a government decides to alter its strategy and tactics towards NSAs. Moreover, governmental institutions are often the battle ground of conflicting interests between national elites representing particularistic interests and government bureaucrats representing government policy. Prolonged policy disputes often lead to a weakening of state institutions and a strengthening of power of NSA actors.

When confronted with the influencing pressures of NSAs, governmental actors often take ambiguous, if not contradictory, positions as a way to elevate themselves to the position of mediator between civil society and the business sector. Yet, this intermediary position can also be detrimental for governmental actors as they become the target of criticism by their citizens who do not want to see their governments be too close or be under the influence of the two NSAs.

NSAs have the opportunity to challenge a government's policy on the domestic level first and on the international level later. At the national stage, NSAs have the possibility to impact directly in the policy articulation and creation process through tactics of consensual cooperation in parliament and other state institutions, as well as by using confrontational tactics such as using advocacy positions close to civil society to pressure the government. At the international level, the NSAs' abilities to influence are often based on confrontational tactics that focus on media coverage and public attention. Yet, there are a growing number of initiatives such as the Global Social Responsibility Standard, the UN Global Compact and the Forest and Marine Stewardship Councils, which intended to include TNCs and civil society into a joint policy negotiation process in cooperation with IOs and State Actors. In other words, international governance is

increasingly characterized by cooperative partnerships involving governmental as well as transnational actors, both TNCs and I-NGOs.⁴⁷

TRANSNATIONAL CORPORATIONS (TNCs)

In contrast to the governmental actors, TNCs are subject to fewer fluctuations from within since in the majority of cases, their structure is hierarchically organised and lacks most of the participative elements characterising governmental institutions. Yet, they also have to face a changing and sometimes turbulent environment due to their international competition for world market share and profitability and their often conflictual relations with labour unions, consumer groups and civil society organisations.

Most TNCs do not have a separate department that deals with international public relations. In fact, the majority of TNCs only recently recognised the importance of international political affairs and, therefore, business diplomacy as a means to satisfy the long-term needs for sustainable corporate growth and development is a rather new field of study.

According to Saner & Yiu (2003),⁴⁸ business diplomacy's aim is to "manage the interfaces between the global company and its multiple non-business counterparts and external constituencies." Yet, as grassroots organisations and I-NGOs are much more

⁴⁷ Risse, Th. "Transnational Actors and World Politics." *Handbook of International Relations*. Carlsnaes, W. et al. p.

²⁶⁹

⁴⁸ Ibid. (p 16).

fragmented than states, TNCs need to develop different approaches for each of the two stakeholder groups. They normally do not have specifically trained staff and often rely on experienced diplomats seconded to a TNC from the foreign office or on business executives, who work together in a coequal manner across different departments such as Public Relations, Legal Division and/or Government Affairs.

Business diplomacy's main objectives can be described as follows: *i)* to influence economic and social actors to create and seize new business opportunities; *ii)* to work with rule-making international bodies whose decisions affect international business; *iii)* to forestall potential conflicts with stakeholders and minimise political risks; *iv)* to use multiple international fora and media channels to safeguard corporate image and reputation.⁴⁹

Most TNCs are corporations listed and traded at stock exchanges and their ownership structure consists of a multitude of shareholders ranging widely in size, making governance of TNCs increasingly more complex and difficult. While pension fund managers for instance request "democratic" control of key positions within TNCs through the effective empowerment of shareholders, they are also keen on ensuring that corporations are able to disburse high dividends which puts short-term pressure on TNCs' top management often at the cost of prudent long-term business decision making. As a result, relations with top business managers have become erratic and more confrontational and in light of the current financial crisis and staggering drop of share prices, relations between top managers – especially CEOs of financial brokerages and banks – and their respective share holders have further deteriorated to the extent that government bail outs in massive scale were needed to prevent financial collapse and full confrontations between top management and share holders as well as the public at large.

INTERGOVERNMENTAL ORGANISATIONS (IOS)

Governments interact with each other based on traditional diplomatic channels and practices but they can also interact through intergovernmental organizations.⁵⁰ IOs can be divided into two subdivisions according to their institutional environment and purpose. One distinction can be made between IOs that are an intimate part of the UN system and those that are rather detached from it. The distinction is important in terms of legal proceedings and overall bargaining power, since they may or may not have the opportunity to link issue- areas, thereby widening their policy options or carrying out what has been termed as “forum shifting.”⁵¹

Forum shifting has been an extremely efficient tactic of powerful governmental actors as well as dominant IOs to exclude the greatest number of weak governmental actors and non-state actors from certain policy negotiations. Drastic forum shifting has actually been one of the main reasons for the revival of the (I)-NGO movement during the 1990s, which can be understood as a reaction to perceived imbalance and injustice in global governance issues.

The other important distinction is between IOs that focus on problems of coordination and those that deal with problems of cooperation. IOs partaking in global

⁴⁹ Ibid. p. 16

⁵⁰ See pioneering first publication on this topic by R. O. Keohane and J.S. Nye, “Transnational Relations and World Politics”, Harvard University Press, Cambridge, Mass. 1970, pp. ix-xxix- (introduction).

⁵¹ Niggli and Rothenbühler 2003 p.2

governance and international economic policy making are the International Labour Organisation (ILO), the World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD) as well as on the World Bank (WB), the International Monetary Fund (IMF) and the Organisation for Economic Co-operation and Development (OECD).

INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS (I-NGOS)

The NGO field is characterised by its heterogeneity. 'NGOs differ strongly in regard to their focus and organizational history and characteristics such as size, origin, membership and management.'⁵² Distinction needs to be made between NGOs acting within national boundaries and those operating on an international level through their own foreign outlets as well as through alliances with like minded I-NGOs.⁵³

NGOs' fields of activity can range from business and economic development to faith, government policy, health issues or poverty reduction. Issue areas, which are relatively new and lack appropriate legislative bodies tend to generate a lot of NGO activity since they often set the grounds for subsequent regulatory action. This whole process can be extensive and multi-faceted with individual NGOs taking on single functional tasks in the whole chain of activity carried out by a group of NGOs.

However, it is often not clear who an international policy oriented NGO represents. They are often neither physically present in the field nor easy to contact. It is hence important to take a closer look at the relationship between an NGO and the cause they propagate or defend. Analysing different types of NGO representation, Hersel talks of three representative functions that NGOs can adopt: *functional*, when they speak for some; *delegative*, when they speak on behalf of others; *informative*, when they speak in the interest of others.⁵⁴ These representation

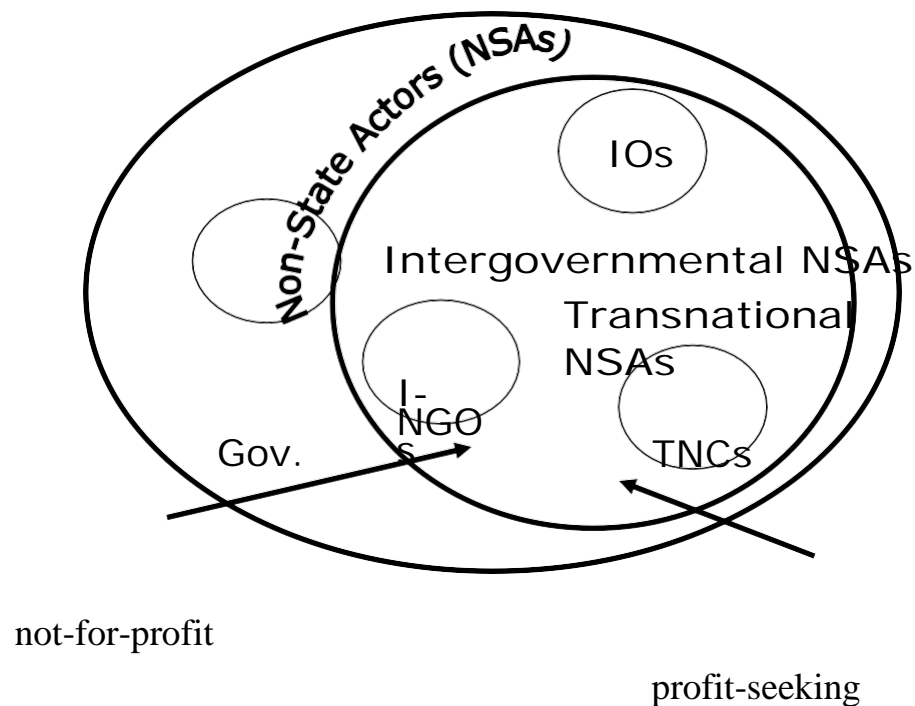
claims can lead to legitimacy deficits, which many NGOs, according to Batliwala, try to offset by creating or participating in networks of grassroots organisations thereby benefiting from a perceived increase of credibility.⁵⁵ These networks in turn function as intermediaries in several ways with special emphasis on information sharing, connecting the global and local arenas.⁵⁶

NGOs can be further subdivided according to who controls them. Even though NGOs might be non-governmental and not-for-profit, governments and businesses can also create such entities in order to promote their interest and meddle in the “NGO field”. One can therefore identify three subgroups: Business NGOs, Governmental NGOs and Civil Society NGOs.

Business NGOs

Business NGOs may be qualified as such mostly because of their structural nature. They dispose of a permanent structure and can be considered financially independent. They cannot necessarily be qualified on the basis of consequential aspects. Their funding emanates largely or exclusively from TNCs or business associations who control these NGOs openly or covertly. Even if a business NGOs can be considered more or less

⁵² Sadoun 2007 (p. 3).
⁵³ Saner & Yiu (2003) p. 15
⁵⁴ Hersel 1998.
⁵⁵ Batliwala 2002.
⁵⁶ Markowitz 2001.

Figure 2

independent, one can assume that they favour international economic policy that overtly suits the TNCs and business associations. Examples that fall into this category are the International Chamber of Commerce (ICC) and BUSINESSEUROPE.⁵⁷

Governmental NGOs

Governmental NGOs are those with strong ties to states and governments. These relationships can transpire through extensive funding, through personal contacts or through patriotic and nationalist movements. Such NGOs often serve as a vehicle to create and sustain positive publicity in different media and to portray state interests in foreign countries, especially when considering NGOs that specialise in aid, development and poverty relief. Examples that fall into this category are the Venezuela-

sponsored Bolivarian Circles, the National Endowment for Democracy (NED) funded by the US government, and Saudi Arabia's International Islamic Relief Organisation.

Civil Society Organisations (CSOs)

NGOs, which do not fit within the two previous categories, can generally be termed as Civil Society Organisations (CSOs). A key feature of CSOs is that, besides being aligned in responsibility and duties with their clientele in terms of functional, delegative and

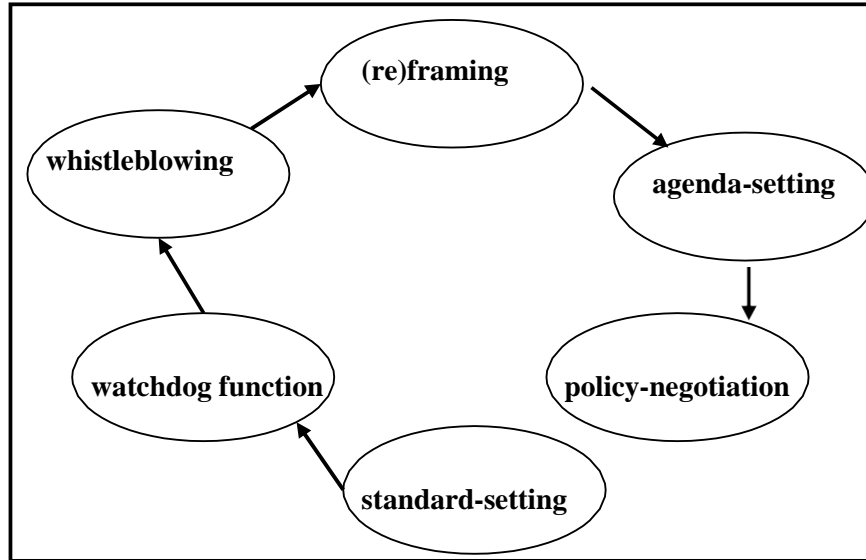
⁵⁷ Known as UNICE before it changed its name in 2007.

informative representation, they also claim to defend moral values on a universal scale. Kaldor describes civil society as “that voluntary sphere in which individuals come together from outside the state and the market in order to promote common interest.”⁵⁸ NGOs are often equate with CSOs. However, business NGOs and governmental NGOs do not necessarily need to be consistent with each other. For example, civil society also includes community-based organisations and other forms of association, which do not necessarily fulfil all the criteria stated by Sadoun⁵⁹. Examples that fall into this category are Greenpeace, Médecins sans Frontières (MSF), Oxfam, Save the Children, and the World Wildlife Fund (WWF).

THE INTERNATIONAL POLICY SPACE

Seen from a system’s point of view, the international policy arena can be subdivided into six processes with different combinations of stakeholders interactions. This contrasts with the traditional understanding of policy making as being of a linear nature. The processes described below do not always follow the path illustrated below sometimes certain processes can be omitted or processes can take place concomitantly, but the basic circularity shown is observable.

*Figure 3 The
International Policy
Space*



(Re)framing

Before interactions between stakeholders take place in the international policy space, a preliminary process is often initiated leading to the mental framing or reframing of a) issue-

⁵⁸ Kaldor 2003.

⁵⁹ Sadoun 2007 (p. 2).

areas; b) relevant concepts and working tools that link them; c) possible opponents. This enables stakeholders to build a coherent perspective or ideology on multiple issues by linking personal belief systems and culture with strategic thinking. For a later agenda to resonate, one should not only identify a problem, but also assign blame.⁶⁰ This is a unilateral action in principle, although certain alliances can already be moulded at this stage as actors realise that they share the same viewpoints. I-NGOs and social movements have been very active and innovative in this field over the past decade, but governmental actors and MNCs are starting to catch up through reverse learning.

Agenda setting

As a result of the framing process, actors prioritise certain issues over others thereby creating a perspective or an ideology. At first, this process takes place on an internal stage by eliminating dissent amongst subgroups and consolidating the agenda around the core issues, a stakeholder wants to put forward. As the urgency of the matter increases, which is best exemplified by the HIV/AIDS or the food crisis, the process is taken to an external audience of critical actors, thereby eliciting a public contention that often turns out to be ardent and vociferous. Even though the demand to bring about change to an existing agenda or to create a new one with regard to emerging issue-areas might be unilateral at the outset, once the media has engaged in extensive and “loud” coverage, it often is not only the stakeholders involved but also the different public opinions that participate in a rather inclusive debate.⁶¹

Applying Suchman’s differentiation between consequential and structural aspects of moral legitimacy⁶² to the agenda-setting process, one can identify radical activist groups as the dominating forces in the I-NGO field. Den Hond and De Backer state that “In striving for deinstitutionalization of an established frame, reformative

activist groups use consequential arguments, whereas radical activist groups supplement consequential arguments with structural arguments.”⁶³ As the actors are not keen to restrain the range of available tactics and possible partnerships, the general conditions of negotiations cannot apply since the main participants do not seclude themselves, and the environment remains permeable to information.

The agenda-setting process should be seen as a non-recurring debate rather than as a negotiation process. It is a winner-takes-all issue, and it is often a matter of serious and sometimes violent contention as was the case in Seattle in 1999 or in Genova in 2001. However, some negotiations might still take place at the end of the agenda-setting process as a consolidating measure, thereby engaging reformative I-NGOs to some extent. Such negotiations are distributive in nature as the agenda-setting process, in its broad definition, is not sufficiently iterative and rarely involves multiple layers of integrative bargaining. This leads to a predominance of power relations whose major features are alliances, and stakeholders’ framing and dissemination of information. These two categories of tactics are sharpened and illustrated by the media’s magnifying glass selectively amplifying opinions and turning them into dominant topics. One can also categorise the intermediary processes between the agenda setting and policy negotiation processes as described by Donnelly

⁶⁰ Rochefort and Cobb 1994.

⁶¹ Sell and Prakash 2004 p. 152

⁶² Suchmann 1995.

⁶³ Den Hond and De Backer 2007 p. 907

(1999) on the basis of Keck and Sikkink's original work on transnational advocacy networks.⁶⁴

Policy negotiation

Once an agenda has been created, specific issues within it need to be negotiated involving the different stakeholders. This happens on a relatively regular basis, and the different alliances are more agreeable to making concessions as they realise that losing now can be compensated by winning later. The policy negotiation process is characterised by a secluded environment from which information should not be disclosed except for deliberate "leaks". As negotiations require compromise and trust in order to be successful, stakeholders privilege their opponents with involvement and information dissemination.

Since these negotiations take place in an iterative context and deal with multiple layers of needs, they can be considered to be of an integrative nature and to be dominated by bargaining and an information policy process based on consensual bargaining, which does not mean that the participants readily agree. Most often they overwhelmingly disagree, but as the content of negotiations becomes more technical in comparison to the agenda-setting process, concessions are made more easily. Participants are willing to make compromises since these are not perceived as a threat to stakeholders' identity and the projection of that identity which could be the case with ideological concessions.

Standard setting

Standard setting is usually a unilateral, non-interactive process, which for a long time was restricted to the economic sphere only. Although they often operate in the background and do not frequently receive public attention, rating agencies such as Moody's and Standard & Poor's exert enormous influence on the business world by setting

standards on the credit eligibility of companies and countries alike. Their professional and consistent approach helps them gain powerful reputational capital, which gives them the capacity to set standards without any backing from governmental actors. Standard setting as a “private” tool is particularly useful in times of political stalemate, when stakeholders are not prepared to engage in consensual action and when governments are not keen on introducing legal provisions. I-NGOs have also started to take similar measures in influencing the international economic policy. Although they certainly do not have an economic leverage comparable to that of credit rating agencies, I-NGOs have started to develop labels and certificates. These are efficient tools to publicly pinpoint those governmental actors and TNCs who comply with certain minimal standards and those who do not. Many of these labels and certificates focus on fair trade or biological food production, certifiable sustainable wood production, or the energy efficiency of major appliances. The power of standards is strongly tied to the accumulation and management of reputational capital by the entity issuing them and this in turn requires extensive commitment and loyalty to one’s audience.

Playing watchdog

An important process of the international policy environment is monitoring and safeguarding, especially when it comes to the evaluation and re-evaluation of the implementation of existing agreements. Compliance with negotiated agreements should not

⁶⁴ Keck and Sikkink 1999.

be taken for granted as some stakeholders need to be reminded regularly about what they agreed to do during a previous stage. New leaders may try to disengage from earlier agreements and ignore existing practices. An evaluation process of the implementation of a policy is helpful even for those stakeholders, which do not oppose the change. External experts, often staff of I-NGOs, can provide observations as well as constructive critique.

Another way of fulfilling the watchdog role is monitoring the behaviour and the actions of stakeholders and by establishing (negative) ranking lists, which are used effectively by such I-NGOs as Covalence, and Transparency International. These alternative methods of gaining public attention create a similar, though inverse, effect as the credit ratings published by Moody's or Standard & Poor's. Negative rankings are used beyond the domain of finance and corruption. Additionally, they are now applied to I-NGOs themselves⁶⁵. Together the two processes of monitoring and safeguarding are characterized as the "watchdog function".

Whistleblowing

The process of whistleblowing has a long history in citizens' movements and public protests. However, the process of whistleblowing has undergone radical change and appeared for the first time on a mass and global scale at the turn of century in the anti- globalisation movement. Modern media has revolutionised the environment in which information is transmitted leading to a significantly higher mobility and interactivity by the "end consumer" of international economic policy.

Although this process does not include I-NGOs as participants, one can consider it to represent the first step in their subsequent involvement. Once individual citizens' concerns are bundled together, the I-NGOs can generate a social movement or even create an NGO/I-NGO and formalise and institutionalise it afterwards. Critical attitudes taken by citizens and especially the new

interactivity and connectivity that come with it are key aspects of this emerging I-NGO activity.

As transaction costs in information sharing have become miniscule, information can be transmitted at almost no cost, and coalitions are quickly formed. This describes a similar behaviour to the one resulting from Donnelly's notion of "grassroots education"⁶⁶. Citizens' concerted actions can impact the policy-making process in a direct manner, by circumventing governmental actors as representatives of constituencies, thus transforming it from being a unidirectional top-down process to an ever more circular 'feedback process.' Therefore, whistleblowing is a key process combining circularity with democratisation of the international economic policy space since it connects the process of "playing watchdog" with the process of (re)framing.

The mushrooming of watchdogs, mostly in the form of public-private partnerships is the most visible manifestation of this new circular mode of international policy-making. They are the key element that enables I-NGOs to move from a linear interpretation of policy-making to a circular one by connecting outcomes (standard setting) with expectations (whistleblowing).

⁶⁵ For details see the rankings compiled by the Financial Times in association with Dalberg Global Development Advisers and the United Nations Global Compact. July 5th 2007. http://media.ft.com/cms/e462102e-2b03-11dc-85f9-000b5df10621,dwp_uuid=c1927432-1f9e-11dc-ac86-000b5df10621.pdf

⁶⁶ Donnelly 1999. pp. 32-33

Relationships that emerge among I-NGO networks can be highly problematic and affect the integrity and effectiveness of their advocacy campaigns leading scholars to call for measures of political responsibility and accountability.⁶⁷

What follows are case examples of multi-actor diplomacy and the participation of state and non-state actors in cross-border conflicts and negotiation processes. Case analyses are offered which describe such complex multi-actor conflicts in the social, economic, military and political spheres in western and non-western countries and economies. The goal is to help better understand the patterns of interaction and the negotiations processes between the state and non-actors, how their typologies vary depending on the conflict at hand, the number of participating actors, and a constellation of policy environments.

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PART I: ENVIRONMENTAL & SOCIAL CONFLICTS

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NEGOTIATING WATER RESOURCE CONFLICTS IN TAJIKISTAN AND UZBEKISTAN AT BILATERAL AND REGIONAL LEVELS

Adiba Asadova

ABSTRACT

This chapter analyses the potential water resource conflict in Central Asia focusing particularly on two countries: Tajikistan and Uzbekistan. It gives a historical overview along with a Strengths, Weaknesses, Opportunities, and Threats (SWOT) analysis for each of the actors involved. Additionally, four scenarios are presented indicating a possible peaceful or turbulent future in Tajikistan and Uzbekistan using Scenario Planning Analysis Framework.

INTRODUCTION

Water is an important ingredient for the population's survival, and today's environmental degradation makes it an extremely politicized global issue. There are a few dozen conflicts around the world directly linked to water issues due to its unavailability or scarcity. As the world population grows, so does the demand for fresh water.

Central Asia is a region rich in water resources with more than 90 per cent of them concentrated in the mountains of Kyrgyzstan and Tajikistan. The main consumers, Uzbekistan and Kazakhstan, can meet roughly 14 per cent to 45 per cent, respectively, of their own water needs. The upstream countries (Tajikistan and Kyrgyzstan) view water as a commodity for trade and profit, especially since their endowment in other resources is extremely poor. Control over water is important for these countries as they need it to generate much of their own power needs. On the other hand, even though downstream countries (Uzbekistan, Turkmenistan, and Kazakhstan) have enormous reserves of other natural resources, water is an important ingredient for their large agricultural sector.¹

After presenting a brief historical overview, this essay will concentrate specifically on the relationship between Tajikistan and Uzbekistan, providing an overview of a complex relationship between an upstream and a downstream country. Furthermore, four scenarios will be presented illustrating possibilities for a peaceful or turbulent future in Tajikistan and Uzbekistan using *Scenario Planning Analysis Framework*.

Currently, water resources represent a major source of conflict in Central Asia. This could potentially escalate as the region experiences reoccurring droughts and uneven distribution of water without proper compensation. Previous agreements in the region have

¹ Karaev, Zainuddin. "Managing the Water Resources in Central Asia: Is Cooperation Possible?" Paper prepared for the workshop "Resources, Governance and Civil War" European Consortium for Political Research Joint Sessions of Workshops University of Uppsala. Pages 10-11

been reached with the help of local and international pressure. However, due to seasonal variations and the complex nature of domestic politics and inter-state relations regarding water, these agreements are usually broken. In the next few years Central Asian policymakers could use water as a tool for a peaceful coexistence or violent future.²

BRIEF HISTORICAL OVERVIEW

The Soviet Union's policy to turn the region into a major cotton plantation in 1960s is considered the root of the present water scarcity problem in Central Asia. "An impressive irrigation network, canals, and reservoirs were built to serve cotton production," making the region one of the world's biggest cotton producers with "Uzbekistan alone producing and exporting as much as four million tons of cottons annually."³ The Soviet policy resulted in increased water consumption and a decrease in the water level in the Aral Sea, a major environmental disaster that is directly linked to the deterioration of health, rising infant mortality rates, and migrations of inhabitants in the Aral Sea Basin.⁴

Moreover, the Soviet cotton production system completely ignored any "historical and national legacies." It created ambiguous Soviet borders and left minority communities at every border, undermining political relationships and economic development. Traditional borders were ignored by Moscow planners. Rather they set up a system where "water reservoirs for the irrigation of cotton in Uzbekistan were constructed in Kyrgyzstan, Kyrgyz cotton was ginned in Uzbekistan and the route between them ran through Tajikistan."⁵ This interdependence system was disrupted with the collapse of the Soviet Union, creating tension between countries and destabilizing the region.

The collapse of the Soviet Union exposed the fact that Central Asian countries were ill prepared for their independence given the previous interdependence system. According to the International Crisis Group (ICG), water is one of the main sources of internal conflict, creating a tense situation across the region. The ICG points out that water disputes are factors "hindering economic development, fuelling extremism and occasionally resulting in violence."⁶

Upon their independence in the early 1990s, Tajikistan experienced a civil war, and Uzbekistan adopted an isolationist policy. Moreover, the fact that these two countries have a visa regime among each other puts local rural border communities at a disadvantage and makes it difficult to pursue a policy of regional cooperation.

² Horsman, Stuart. "Environment Security in Central Asia" The Royal Institute of International Affairs Briefing Paper.

³ Karaev, Zainuddin. "Water Diplomacy in Central Asia" Middle East Review of International Affairs. Page 64

⁴ Weintal, Erica. "Making Waves: Third Parties and International Mediation in the Aral Sea Basin." Words Over

War: Mediation and Arbitration to Prevent Deadly Conflict. Pages 267-269

⁵ Karaev, Zainuddin. "Water Diplomacy in Central Asia" Middle East Review of International Affairs. Page 64

⁶ "Water and Conflict." International Crisis Group Asia Report. p. 5

SCENARIO PLANNING ANALYSIS

While it is difficult to predict the exact future of water resource conflict between Tajikistan and Uzbekistan, the purpose of the Scenario Planning process along with the SWOT analysis is to inform the potentially difficult choices that key actors may be forced to make. This process identified the two most critical uncertainties that these actors face in an effort to understand the different futures in Tajikistan and Uzbekistan. The four possible scenarios lead to conclusions and policy recommendations to guide countries in an effort to peaceful co-existence.

*Driving Forces - Key Actors**Tajikistan*

Strengths

The country is rich in water resources.

Weaknesses

Civil war destabilized the country for years after the demise of the Soviet Union, leaving the country extremely poor and in a vulnerable position. Tajikistan's natural resources are untapped due to lack of investments, forcing the country to be highly dependent on the energy resources of Uzbekistan.

Opportunities

State officials have been trying to attract foreign investment to complete the Rogun hydropower station, which began construction under the Soviet rule. This 335-meter high dam (highest in the world) has a potential to produce 3,600 MW of energy. Tajikistan is also hoping to build a smaller hydropower station, Sangtuda, which would produce 670 MW of energy. Both these stations have the potential of making Tajikistan not only energy self-sufficient, but also an exporter of energy to neighboring countries.⁷

Threats

Uzbekistan is rigorously opposed to the construction of the Rogun station. In the absence of strong allies, Tajikistan cannot afford aggravating its neighbor. Tajikistan has previously relied on the power alliance with Russia, but recently Uzbekistan changed its politics, becoming a close ally of Russia as well.

Uzbekistan

Strengths

Uzbekistan is a country rich in natural resources, including metals, gas, coal, and minerals. Over the years, it has been successful in attracting foreign investors to cultivate its potential.

⁷ "Water and Conflict." International Crisis Group Asia Report. p. 23

Weaknesses

As a downstream country, Uzbekistan is extremely dependent on water resources from the upstream countries. The country is unable to provide enough water for its agricultural production, one of its major exports and a source of income for the majority of the rural population.

Opportunities

Recently, Uzbekistan allied itself with Russia, again creating an opportunity for regional cooperation as Tajikistan is also a close ally of Russia.

Threats

If Tajikistan is successful in building the Rogun station, it would threaten Uzbek agricultural production as the flow of water would be more limited. Uzbekistan has been lobbying against the building of the Rogun station, though tolerant of the Sangtuba station.⁸ Uzbekistan's current strained position with international organizations and the West could prove risky if it further alienates Washington, DC and Western capitals.

Local rural populations

Strengths

Both Tajikistan and Uzbekistan have large rural populations with considerable strength if they are discontent and want to take up arms. Since Tajikistan has already experienced the civil war, the population is more reluctant to pursue a violent path. However, in Uzbekistan the growing dissatisfaction with government policies emboldens the population (so far, the government has been successful in suppressing uprisings).

Weaknesses

Local populations cannot rely solely on subsidies from their governments, which are cash strapped; therefore, farmers are left on their own to provide for families. In addition, most farmers are income dependent on state agriculture.

Opportunities

Farmers need to work with their respective governments and international donors to develop and encourage various NGO initiatives that would benefit their livelihoods and ensure their place in the civil society.

Threats

When the livelihoods of farmers jeopardized, they can turn to violence as occurred in late 1980s and early 1990s pointed where farmers on both sides of the border and in the region clashed over water disputes.⁹ The reoccurrence of these conflicts could have devastating

⁸ Ibid. pp 23-24

⁹ Weintal, Erica. "Making Waves: Third Parties and International Mediation in the Aral Sea Basin." *Words Over*

War: Medication and Arbitration to Prevent Deadly Conflict. Page 269

repercussions in both countries and the region as a whole. There is a higher potential of discontent among Uzbek farmers as seen in previous violent clashes within the nation and against its neighbors.

International community (countries, organizations, and donors)

Strengths

The international community is in the position to bring peace and security to the region with programs that unite local populations and government.

Weaknesses

Some members of the international community are dependent on the policies of their countries, so they cannot freely exercise their activities. They especially have to take into account the fragile relationship between Tajikistan and Uzbekistan to avoid creating an even more hostile situation.

Opportunities

The international community has an opportunity to bring countries together by promoting regional cooperation as a condition for financial assistance.

Threats

In case the international community supports or favors one country over the other through financial resources and/or policies, the outcome could threaten the security of the region as this support would create opportunities only for one country or another, and as a result would cause disequilibrium and inequality.

Driving Forces - Certainties

Both countries are dependent on water resources for their agricultural survival. Tajikistan has an advantage during the summer season when Uzbekistan requires more water, while Uzbekistan has advantage during the winter season when Tajikistan depends on its energy supply.¹⁰ Thus, countries use these seasonal variations as leverage when negotiating water allocations. Other certainties include continued degradation of water quality and quantity; unemployment; environmental risks; poverty among the rural populations; and threat to human development.

Driving Forces - Uncertainties

Even though Tajikistan and Uzbekistan have avoided violent confrontation, escalating verbal threats point to a serious potential conflict in the region. Both countries have already witnessed violent clashes among rural populations inside their countries as well as between the border communities. *Two crucial uncertainties* right now is the ability of both countries

¹⁰ Karaev, Zainuddin. "Water Diplomacy in Central Asia" *Middle East Review of International Affairs*. p 68

to successfully manage water resources and the ability of the international community to influence or pressure Tajikistan and Uzbekistan to collaborate.

First Uncertainty - Water Management

As many former Soviet countries, Tajikistan and Uzbekistan were poorly prepared for their independence. Under the Soviet rule, most of the resources and institutions were centralized by decisions taken in Moscow disregarding national borders and self-sufficiency. With the collapse of the Soviet Union, water usage and allocation became an international issue with each country contesting sovereignty over its resources.

In 1991, the water ministries in Central Asia signed agreements on the allocation of water and created the Interstate Coordinating Water Commission (ICWC). The ICWC runs Scientific Information Center (SIC) where it trains water officials, organizes seminars, and operates the water database. In addition, the ICWC facilitates water quotas and its executive body – the Base Water-Management Associations (BWA) – monitors implementation. All these managerial bodies are located in Uzbekistan, which creates further tension as Tajikistan believes that Uzbekistan favors its position.¹¹ These bodies are poorly maintained and need significant restructuring taking into account current water needs and usage of each country.

Second Uncertainty – Role of the international community

The international community favors the issue of water and up until now has been involved on a technical level rather than on political and economic ones. Technical assistance is important for local communities, but the current situation in Tajikistan and Uzbekistan needs a political solution if the international community wants to avoid a potential violent conflict.

Unfortunately, the international community has been unsuccessful in brokering strong regional initiatives to promote collaboration on water usage. However, they must not turn a blind eye, but rather pursue water dialogue and help these countries to negotiate and draft a legal framework for water resources. Moreover, the international community should impose penalties on Tajikistan and Uzbekistan if agreements are broken; otherwise, their tireless work would go unnoticed.¹²

Taking these two critical uncertainties in mind, the following four quadrants constructed help sketch the four scenarios presented below. (see next page)

Scenario 1: “Friendly” neighbors

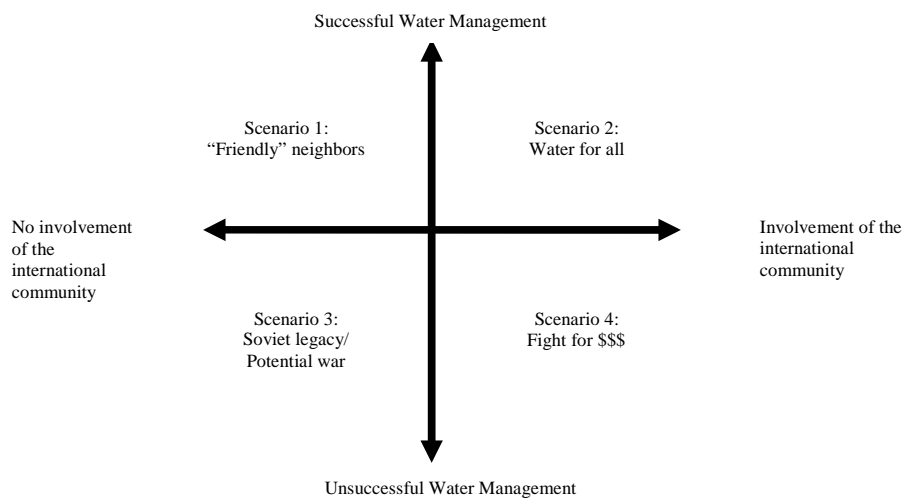
In this scenario both countries agree that there is a need to restructure water management institutions including revising quotas by regularly analyzing the use of water by populations. In addition, both countries pay attention to quality and quantity of water.

Since countries reject the involvement of the international community, they enter into bilateral negotiations. The result of these negotiations could include barter agreements trading water for energy resources. Tajikistan would have to make more concessions and

¹¹ “Water and Conflict.” *International Crisis Group Asia Report*. p 7

¹² Ibid pp 28-29

ignore the idea of building the Rogun station by adopting a strategy of accommodation. However, this strategy on the Tajik part would not be too harmful if it benefits the greater region as a whole and if Uzbekistan honors its part of the deal.



The danger of this scenario lies in the fact that the international community is shut out and is not able to monitor the implementation of agreements and to make sure that their contents are up to international standards. Moreover, there is a possibility that existing rivalries resurface and lead to a suspension or breakdown of negotiations in the absence of third parties. Thus, the strategy of avoiding the support of the international community could turn into conflict if all actors are not present in the discussion and the legality of agreements is contested.

Scenario 2: Water for all

In this scenario, Tajikistan and Uzbekistan engage in a highly collaborative strategy by committing themselves to restructure water management institutions. Their collaboration with international organizations would help manage resources effectively and efficiently by serving all populations. The international community along with the civil society would help the government to draft laws that may help prevent further environment degradation.

This collaborative behavior can lead to potentially successful agreements and negotiations and the creation of the legal framework benefiting urban and rural populations in both countries. The ICWC institution would be restructured and would set up branches in other countries; moreover, allocation of water would be revised. Here, all actors are engaged on equal footing with a mutual goal of sharing resources pursuing an integrative bargaining process. There is an understanding that a violent conflict would bring more harmful results, thus seeking a peaceful resolution is on everyone's agenda.

Scenario 3: Soviet legacy/ possibility of war

This scenario presents the “negative” version of the Soviet legacy. It is potentially very dangerous because both countries adopt competitive strategies and engage in a zero-sum game. The two countries broker negotiations, but break them immediately in the absence of the international community. There is almost no monitoring of resources since both countries are competing for their best interests. Both countries adopt avoidance strategies in order not to deal with restructuring water management institutions.

The biggest losers in this scenario are the rural populations of Tajikistan and Uzbekistan. While their respective governments engage in competitive and avoidance strategies, their crops are damaged and livelihoods are threatened. There are further social implications such as underemployment and unemployment, internal and external migration, and a decrease in health nutrition. This social discontent could potentially lead to internal violence with spillovers to neighboring countries including Kyrgyzstan and Kazakhstan.

Scenario 4: Fight for \$\$\$

A competitive strategy on the part of both countries is even more prevalent in this scenario where Tajikistan is seeking assistance from the international community to build the Rogun station and Uzbekistan is lobbying to halt it. In addition, neither country wants to invest in restructuring water management institutions as there is no interest in regional cooperation. The process of distributing bargaining is at the center of this scenario where each country is trying to outdo the other.

However, the role of the international community is critical here as it can pressure both governments for regional cooperation. They can leverage financial assistance in order to successfully negotiate agreements. The international community needs to remain in the region for a long period of time in order to observe the implementation of these agreements; however, it must be prepared to face some hostility and resistance.

CONCLUSION

The overall analysis and four possible scenarios for Tajikistan and Uzbekistan demonstrate that presently water is a major source of conflict between these two countries, which can potentially threaten the security of the whole Central Asian region. So far the region has been successful in avoiding major violent clashes; however, current strained relations among different actors could aggravate the situation leading to devastating consequences.

Experts agree that Central Asia has enough water to cover the needs of all countries, but the fact that water management is not treated seriously could lead to its scarcity. Policymakers in the region need to adopt a compromising strategy in order to satisfy the needs of its populations and agricultural production. Some of the key policy recommendations include:

- To restructure water management i.e. revise water quotas set under the Soviet rule taking into account today’s needs; and create greater transparency in the ICWC
- To create a legal framework and system with the help of the international community to honor international standards
- To negotiate agreements that are not only barter agreements in nature
- To involve in regional cooperation (avoid current zero-sum game)

Further negotiations on bilateral and regional levels need to be pursued by Central Asian policymakers. The international community should support these negotiations by proposing various conflict resolutions such as legislation, adjudication, arbitration, mediation, conciliation, facilitation, and negotiation.¹³ However, the international community needs to be sensitive to political and economic situation of the region taking into account each country's interests and welfare.

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¹³ Saner, Raymond. *The Expert Negotiator*. p 146

GLOBAL MORATORIUM OF BOTTOM TRAWLING

FISHERY PRACTICE

Nao Iwamura

ABSTRACT

Bottom trawling practices are becoming a growing concern for countries whose domestic waters are affected by the destruction of marine biodiversity in international waters. Effective global prohibition of unregulated bottom trawling in international waters is a challenging objective that faces strong opposition from countries with large fishing markets. The negotiations on bottom trawling prohibition involve various parties including environmental NGOs, the fishing industry, and governments. This complex multi-stakeholder conflict is currently being debated within the United Nations (UN) framework. The UN's Convention on the Law of the Sea (UNCLOS) is an instrument for the regulation of waters beyond national jurisdictions. However, UNCLOS' effectiveness in coordinating an international response to the challenges posed by bottom trawling is questionable because of significant differences in national enforcement levels. This chapter identifies the positions of multiple parties in the bottom trawling negotiations, examines the role of international institutions and regulations, and explores the possible scenarios of the future negotiation rounds.

INTRODUCTION

Throughout the last decade, bottom trawling, a highly destructive fishing practice has been widely debated and negotiated at both national and international levels. In 2004, the United Nations General Assembly (UNGA), working under growing pressure from both the opponents and supporters of bottom trawling, established an *ad hoc* Open-ended Informal Working Group (Working Group) to participate in the debate over bottom trawling by “[studying] issues related to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.”¹ The Working Group consists of 250 participants, representing governments, UN agencies, inter-governmental and non-governmental organizations (NGOs), as well as the fishing industry.² In an attempt to analyze the possible future paths of this complex multilateral negotiation process, this paper will build on the latest developments in the positions of parties concerned, particularly as demonstrated during a week-long Working Group session held in February 2006 at the UN headquarters in New York.

¹ UNGA Resolution, A/RES/59/24, “Oceans and the law of the sea,” para. 73 (17 Nov. 2004).

² Earth Negotiation Bulletin, “Summary of the working group on marine biodiversity beyond areas of national jurisdiction: 13-17 February 2006,” Vol. 25, No. 25, Feb. 2006, <http://www.iisd.ca/vol25/enb2525e.html>.

BOTTOM TRAWLING AS AN INTERNATIONAL CONCERN

Defining Bottom Trawling

Bottom trawling is a fishing method that involves dragging heavy gear and nets chained to metal plates and heavy discs across the ocean floor to catch fish. Large trawls weighing as much as six tons are dragged to fish over rough seabeds of rock, boulder or coral.³ At issue is the fact that bottom trawling gear amasses all elements of marine ecosystems on the sea floor. Among all the fishing methods currently in use, bottom trawling is known to be particularly destructive to long-living coral and other organisms given that their rate of recovery extends into the decades or even centuries.⁴ Deep coral fields with living organisms exist virtually in every ocean and sea, including the waters surrounding Brazil, Japan, Norway, the United Kingdom (U.K.), the United States of America (U.S.), and small islands in the Pacific Ocean. Greenpeace, an environmental NGO, claims that as of now, at least 275 vessels from eleven countries with a large fishing industry sector are practicing unregulated bottom trawling.⁵

Bottom trawling is not a new practice. It has been used in heavily fished areas since the end of the nineteenth century.⁶ In the 1980s, bottom trawling substantially increased with the advancement of gear-related technology, enabling larger vessels to fish in previously inaccessible areas. Subsequently, the ecological damage inflicted by bottom trawling to deep water biodiversity worldwide has surfaced as an international concern, and bottom trawling-related discussions have gained international momentum.⁷ Finally, marking the tenth anniversary of the United Nations Convention on the Law of the Sea (UNCLOS) in 2004, the UNGA resolution called for Member States to consider an interim prohibition of bottom trawling practices until appropriate conservation and management measures are adopted in accordance with international law.⁸

³ Report of the Secretary-General, "The Impacts of Fishing on Vulnerable Marine Ecosystems: Actions taken by States and regional fisheries management organizations and arrangements to give effect to paragraphs 66 to 69 of General Assembly resolution 59/25 on sustainable fisheries, regarding the impacts of fishing on vulnerable marine ecosystems (advance, unedited text)," para. 20 (14 July 2006).

⁴ Earth Negotiation Bulletin, "Summary of the working group on marine biodiversity beyond areas of national jurisdiction: 13-17 February 2006," Vol. 25, No. 25, Feb. 2006, <http://www.iisd.ca/vol25/enb2525e.html>.

⁵ Rizvi, Haider "No Consensus for Moratorium on Bottom Trawling," *Inter Press Service News Agency*, 30 May 2006, <http://www.ipsnews.net/news.asp?idnews=33426>.

⁶ The Republic of Palau Permanent Mission to the United Nations, "Palau Bottom Trawling Strategy White Paper," p. 1.

⁷ Report of the Secretary-General, "The Impacts of Fishing on Vulnerable Marine Ecosystems: Actions taken by States and regional fisheries management organizations and arrangements to give effect to paragraphs 66 to 69 of General Assembly resolution 59/25 on sustainable fisheries, regarding the impacts of fishing on vulnerable marine ecosystems (advance, unedited text)," para. 20 (14 July 2006).

⁸ UNGA Resolution, A/RES/59/25, "Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments," para. 66 (17 Nov. 2004).

Regulation Mechanisms

The regulation of bottom trawling in areas beyond national jurisdiction has increasingly become an international concern. At the heart of fisheries governance are UNCLOS and the Regional Fishery Management Organizations (RFMOs).

UNCLOS was adopted at the UNGA in 1982 as a result of a nine-year negotiations process and entered into force in 1994 after further negotiation.⁹ UNCLOS establishes a legal framework regulating all aspects of the use of marine resources. (See Appendix 4 for the full list of UNCLOS parties.) The most relevant features of UNCLOS debated during the bottom trawling negotiations include: (i) securing the legal status of resources on the seabed beyond the limits of national jurisdiction; (ii) conservation and management of living marine resources; (iii) protection of the marine environment; and (iv) creation of a binding procedure for settlement of disputes between States.¹⁰ However, UNCLOS-related implementation and enforcement practices range widely across countries. This, in turn, creates a playground for international multi-stakeholder negotiations.¹¹

RFMOs are supervisory bodies responsible for establishing management measures and creating a recognized regulatory power in their jurisdictions. Presently, there are sixteen RFMOs (see Appendix I). The Creation of two additional RFMOs is currently under negotiation. RFMOs are part of the Regional Fishery Bodies (RFBs), which are coordinated and overseen by the United Nations Food and Agriculture Organization (FAO). Under the UNCLOS agreement, the FAO plays an important role in development, implementation, and information-sharing components of high-seas fisheries management. There are forty-four RFBs covering world's waters, divided into three categories: management (RFMOs), advisory, and scientific.

RFMOs are often criticized for having limited sectoral jurisdiction and a lack of clear mechanisms or policy tools to foster cooperation and coordination for tackling bottom trawling practices. So far, only one RFMO, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), has set specific policies on bottom trawling.¹² The rest of the ocean remains exposed to unregulated bottom trawling. Moreover, some UN Member States are skeptical about the capacity or competence of the existing RFMOs to tackle the issues surrounding bottom trawling due to the RFMOs' focus on single species and not the overall marine diversity.¹³ Existence of the vast and unrelated areas of waters outside of RFMOs' jurisdiction further fuels this skepticism.

⁹ The United Nations Division for Ocean Affairs and the Law of the Sea, "United Nations Convention on the Law of the Sea - A historical perspective,"

http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm.

¹⁰ The United Nations Division for Ocean Affairs and the Law of the Sea, "United Nations Convention on the Law of the Sea - Key Provisions,"

http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective.

¹¹ "U.N. General Assembly urges temporary ban on high seas bottom trawling," *Associated Press Worldstream*, 17 Nov. 2004.

¹² The Republic of Palau Permanent Mission to the United Nations, "Palau Bottom Trawling Strategy White Paper," p. 4.

¹³ UNGA Resolution, A/RES/61/65, "Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction," para. 25 (20 Mar. 2006).

MULTI-STAKEHOLDER NEGOTIATIONS

Governments

As in many other areas involving significant economic interest and domestic concern, the position of governments on the issue of bottom trawling vary dramatically across the globe. The general trend is that the more a country's economy depends on fishing, the less likely it is to support a ban on bottom trawling. According to some estimates, eleven countries are responsible for approximately ninety-five percent of the reported high seas bottom trawling catch, namely Denmark, Estonia, Iceland, Japan, Latvia, Lithuania, New Zealand, Norway, Russia, Spain, and Portugal.¹⁴ These countries, like the rest of the international community, can be broadly separated into three distinct groups based on their Reservation Price (RP)¹⁵: the limit of their compromise, and Aspiration Price (AP)¹⁶: the best they wish to obtain, vis-à-vis bottom trawling. Other countries have taken measures to protect their own waters from destructive bottom trawling.

States supporting interim ban on high seas bottom trawling

The key countries supporting an interim ban on high seas bottom trawling are Chile, Costa Rica, the Federal States of Micronesia, Fiji, France, Kiribati, Nigeria, Palau, and Vanuatu (in respect to its overseas territories).¹⁷ These nations are very concerned about the adverse environmental and economic damage to their surrounding waters due to over fishing by bottom trawling. In addition, the Group of 77 at the UN¹⁸ and China have recently joined this group of states given their growing concern with losing future economic benefits related to the uncontrolled use of marine genetic resources.¹⁹

Palau is the most consistent opponent of bottom trawling, persistently advocating a moratorium on this practice at UNGA meetings.²⁰ Palau's stance against bottom trawling is illustrated in its legislation to restrict bottom trawling within domestic waters. It imposes

¹⁴ Black, Richard "Deep-sea trawling's 'great harm'," *BBC News*, 6 Oct. 2004, <http://news.bbc.co.uk/1/hi/sci/tech/3719590.stm>.

¹⁵ Saner, Raymond "The Expert Negotiator, 2nd Edition," 2005, pp. 44-45.

¹⁶ Saner, Raymond. Lecture Spring 2006 Master of Public Affairs Program at Sciences Po Paris.

¹⁷ The Deep Sea Conservation Coalition, "Bottom trawling continues unrestricted as international fisheries meeting ends," Feb. 17, 2006, <http://www.savethehighseas.org/display.cfm?ID=94>; Official record of General Assembly meeting, A/59/PV.55, pp. 2-26 (16 Nov. 2004); The Deep Sea Conservation Coalition, "Momentum in support of a moratorium on high seas bottom trawling continues to grow," http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf.

¹⁸ The Group of 77 at the United Nations is a coalition of developing countries, which aims are to "promote [its members'] collective interests and enhance their joint negotiating capacity [...] within the UN system." The Group of 77 at the UN, <http://www.g77.org/doc/>

¹⁹ Earth Negotiation Bulletin, "Summary of the working group on marine biodiversity beyond areas of national jurisdiction: 13-17 February 2006," Vol. 25, No. 25, Feb. 2006, <http://www.iisd.ca/vol25/enb2525e.html>.

²⁰ Official record of General Assembly meeting, A/60/PV.21, p. 26 (22 Sept. 2005) (containing Palau's call for a moratorium on deep sea bottom trawling); Official record of General Assembly meeting, A/59/PV.55, p. 22 (16 Nov. 2004).

civil and criminal penalties on anyone involved in bottom trawling inside and outside of Palau's exclusive economic zone (EEZ).²¹

Part of the reason for the growing support of moratoriums among these countries is the increased medical use of deep-sea hydrothermal vents. The number of patents issued for such technologies is on the rise. This development has led some nations to push for a bottom trawling ban in all waters. Such countries are keen on developing scientific studies and biotechnology industries to collect deep-sea genetic resources before trawlers destroy them.²²

Therefore, the AP of this group is fundamentally a global moratorium on bottom trawling. States supporting a ban on bottom trawling claim that regional moratoriums are inadequate and insufficient because they leave international waters vulnerable to destruction. Thus, global protection and the management of risks to marine biodiversity (e.g., seamounts, cold water coral, and hydrothermal vents) would require UNGA consensus. In the implementation process of a bottom-trawling ban, the AP of this group also includes the adoption by Member States of appropriate monitoring practices. These include requirements for vessel monitoring systems (VMS) under independent onboard observers with enhanced port state controls to enable authorities to control all vessels bringing in fish caught in prohibited fishing locations.

The RP goals of these countries include: (i) coming to an international agreement on prohibition of bottom trawling in the most vulnerable areas, and the development and use of less damaging fishing gear and techniques; (ii) adoption of an interim prohibition on bottom trawling to halt further damage, until it is scientifically proven that bottom trawling does not destroy deep sea marine sustainability; (iii) adoption of an interim ban on bottom trawling with regard to areas not covered by RFMOs;²³ and (iv) with regard to areas with a competent RFMO, creation of effective measures regulating bottom fisheries by 31 December 2008.²⁴

One proposal by this group was the establishment of an independent expert panel, as well as the development of an RFMOs applicable framework to improve data gathering and exchange. Also, the Pacific Islands Forum has strongly urged the initiation of new negotiations aimed at establishing new RFMOs or arrangements to address the impacts of fishing on vulnerable marine ecosystems. However, a number of Member States within this group spoke in favor of using existing mechanisms and stated that there was "no need

²¹ The Republic of Palau Permanent Mission to the United Nations, "Palau Bottom Trawling Strategy White Paper," p. 2.

²² Ibid.

²³ TerraNature Deepsea Conservation, "Countries work towards a worldwide moratorium on bottom trawling at the United Nations," 22 June 2006, http://terranature.org/bottomTrawling_UNmoratorium.htm.

²⁴ UNGA Draft Resolution, A/61/L.38, "Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and highly Migratory Fish Stocks, and related instruments (by Australia, Austria, Brazil, Canada, Finland, Iceland, Malta, Namibia, New Zealand, Norway, Tonga, Tunisia and the United States of America)," para. 83 (6 Dec. 2006).

for new institutions and legal frameworks to be devised for specific problems and vulnerabilities.”²⁵

States concerned about damaging effects of bottom trawling, but cautious about moratorium

Some states are reluctant to join the global moratorium measure, but many of them are already initiating measures to protect their waters from the adverse impact of bottom trawling. Scientific evidence of the damage to the deep sea ecosystems is taken seriously by these countries, although they are not advancing their marine protection policies onto an international arena. This group includes Australia, Brazil, Chile, New Zealand, Norway, Tunisia, Uganda, Uruguay, the U.S., and the European Union (EU). Countries in this group maintain a broad range of proposals in an effort to establish policies for bottom trawling.

Their AP in the negotiations is a region-by-region or an area-by-area ban to avoid unnecessary restrictions on areas where ban is unjustified (primarily with the aim of minimizing hardship on fishers). Such regional bans could be consequently lifted on case-by-case basis once efficient conservation measures are in place.²⁶ At the Working Group meeting, the above states have reaffirmed their concern with the irreversible damaging effects caused by bottom trawling and set their RP as an immediate review of the issues surrounding with this fishing practice.²⁷ They also welcomed enhanced coordination and cooperation among regions in a framework of RFMOs and called upon RFMOs to enhance regulation and implement measures.²⁸

Some of the countries in this group have taken unilateral measures to address the damage caused by bottom trawling. Most recently, the U.S. federal environmental agencies have begun working on declaring certain areas closed to bottom trawling.²⁹ Notably, the

²⁵ UNGA Resolution, A/RES/61/65, “Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction,” para. 25 (20 Mar. 2006).

²⁶ UNGA, A/59/122, “Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting,” p. 21 (1 July, 2004); UNGA, A/60/99, “Report of the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting,” p. 22 (7 July, 2005); The Deep Sea Conservation Coalition, “Bottom trawling continues unrestricted as international fisheries meeting ends,” 17 Feb. 2006, <http://www.savethehighseas.org/display.cfm?ID=94>.

²⁷ The Deep Sea Conservation Coalition, “Momentum in support of a moratorium on high seas bottom trawling continues to grow,” http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf; Official record of General Assembly meeting, A/59/PV.55, p. 26 (16 Nov. 2004); Official record of General Assembly meeting, A/60/PV.54, pp. 1-26 (28 Nov. 2005); Official record of General Assembly meeting, A/59/PV.55, pp. 2-26 (16 Nov. 2004).

²⁸ UNGA Draft Resolution, A/61/L.38, “Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and highly Migratory Fish Stocks, and related instruments (by Australia, Austria, Brazil, Canada, Finland, Iceland, Malta, Namibia, New Zealand, Norway, Tonga, Tunisia and the United States of America),” paras. 82 & 83 (6 Dec. 2006).

²⁹ The Deep Sea Conservation Coalition, “Momentum in support of a moratorium on high seas bottom trawling continues to grow,” http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf.

National Oceanic and Atmospheric Administration (NOAA) has adopted regulations to secure areas free from bottom trawling and other destructive practices. Further, there a new legislation under consideration aimed at prohibiting all bottom trawling in the vulnerable zones within the U.S.'s EEZ.³⁰

The key player in pushing the AP in this group is New Zealand, particularly due to its significant role in the international fishing industry. In 2001, New Zealand closed 19 seamounts within its EEZ to protect them from bottom trawling. Subsequently, the Ministry of Fisheries have successfully reached a draft agreement with deep sea fishing companies to close down about a third of the New Zealand's EEZ to bottom trawling fisheries.³¹ In 2005, the government announced that it was prepared to support a global moratorium on bottom trawling. However, New Zealand stated that it needed to be confident of a similar commitment by key fishing nations before fully supporting such a moratorium.³² The New Zealand government added that there was no such international consensus at present, nor is there likely be in the near future.³³

Australia established the world's largest fishing-free marine park to protect vulnerable coral reef ecosystems from bottom trawling.³⁴ It appears that in 2005 Australia was caught by surprise by the growing attention paid by the international community to bottom trawling.³⁵ However, Australia stated that it would allow its nationals to "build a sustainable trawl industry in the waters of the Southern Oceans."³⁶ At the international forum, Australia has tried to focus attention away from bottom trawling to the protection of water ecosystems in general.³⁷ Yet bottom trawling is becoming an important issue in Australian domestic politics. Most recently, the main opposition Labour Party has publicly announced its support for urgent protective measures.³⁸

³⁰ The Republic of Palau Permanent Mission to the United Nations, "Palau Bottom Trawling Strategy White Paper," p. 3.

³¹ Ibid.

³² Dover, Mic. "Destructive fishing ban for NZ," *BBC News*, 21 Feb. 2006, <http://news.bbc.co.uk/2/hi/science/nature/4735474.stm>.

³³ TerraNature Deepsea Conservation, "Countries work towards a worldwide moratorium on bottom trawling at the United Nations," 22 June 2006, http://terranature.org/bottomTrawling_UNmoratorium.htm.

³⁴ The Republic of Palau Permanent Mission to the United Nations, "Palau Bottom Trawling Strategy White Paper," p. 3.

³⁵ Official record of General Assembly meeting, A/59/PV.55, p. 21 (16 Nov. 2004) (containing a statement by representative of Australia acknowledging that "Australia was surprised that so much of the negotiation of this year's draft resolution on fisheries was devoted to the issue of bottom-trawling").

³⁶ UNGA, A/59/122, "Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting," p. 22 (1 July 2004).

³⁷ Official record of General Assembly meeting, A/60/PV.54, p. 26 (28 Nov. 2005) (containing a statement by the representative of Australia urging the General Assembly to "not limit our focus simply on the issue of bottom trawling").

³⁸ The Deep Sea Conservation Coalition, "Momentum in support of a moratorium on high seas bottom trawling continues to grow," http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf.

For the moment New Zealand and Australia, both engaged in a large-scale bottom trawling practices, have not supported their fellow Member States' proposal on a global moratorium at the Pacific Islands Forum.³⁹

In 2002, Norway imposed a blanket ban on fishing in its largest coral reef (within its EEZ) after studies indicated that about fifty percent of coral in that area had been lost.⁴⁰ Following imposition of fishing bans on several large reefs, Norway called on other states to increase their coral protection activities and promised that it would continue taking steps to protect other reefs. So far, Norway remains the only country to protect cold-water reefs in European waters.⁴¹

Any move from the EU has significant influence on UNGA consensus as it represents the collective position of 25 countries. Spain, the world's most active bottom trawling country, strongly opposed the EU decision to adopt a bottom trawling ban in the 2004 negotiations at the UNGA. In 2005 France, along with other EU states including Austria, Belgium, Denmark, Germany, The Netherlands, Sweden, and the U.K., called for a global bottom trawling moratorium outside of RFMOs jurisdiction. At the Working Group meeting in 2006, the EU delegation recognized the existence of enough scientific evidence pertaining to the destruction of actual marine biodiversity and deep-sea ecosystems, stating that the Member States are sufficiently knowledgeable of the situation to take action in areas beyond national jurisdiction.⁴²

States strongly opposed to a moratorium

A number of countries have consistently opposed a global moratorium on bottom trawling, including Canada, Iceland, Japan, the Republic of Korea, Russia, and Spain. These countries have traditionally strong fishing industries that constitute a significant portion of their national economies. In addition, they are also known for their extensive use of bottom trawling. For instance, the Spanish fishing fleet is considered responsible for about forty percent of the world's bottom trawling activities.⁴³

Governments strongly opposing a global moratorium on bottom trawling claim that such a ban would put unnecessary restrictions on the fishing industry. They also disagree with the moratorium in international waters or areas outside RFMOs regulation. An absolute AP prerequisite for these countries is sufficient scientific evidence supporting all aspects of proposals made by other states working towards moratorium measures. They generally advocate that any potential moratorium be part of a larger regime for the conservation of the high seas. This can be viewed as a stalling tactic against the ban.⁴⁴ The

³⁹ TerraNature Deepsea Conservation, "Countries work towards a worldwide moratorium on bottom trawling at the United Nations," 22 June 2006, http://terranature.org/bottomTrawling_UNmoratorium.htm.

⁴⁰ Kirby, Alex. "Trawlers 'smashing' cold-water corals," *BBC News*, 26 Feb. 2002, <http://news.bbc.co.uk/1/hi/sci/tech/1835951.stm>.

⁴¹ Ibid.; "Deep-sea corals: out of sight but in harm's way," *CNN*, 10 Aug. 2000, <http://archives.cnn.com/2000/NATURE/08/10/coral.enn/index.html>.

⁴² TerraNature Deepsea Conservation, "Countries work towards a worldwide moratorium on bottom trawling at the United Nations," 22 June 2006, http://terranature.org/bottomTrawling_UNmoratorium.htm.

⁴³ Richard Black, "Call to ban destructive fishing," *BBC News*, 4 Oct. 2005, <http://news.bbc.co.uk/1/hi/sci/tech/4308156.stm>.

⁴⁴ UNGA, A/59/122, "Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting," p. 21 (1 July 2004).

space for RP in this group is carefully limited as their goal is to maintain the bottom trawling *status quo*. According to the countries opposing the moratorium measures, any consideration of a ban would be inappropriate until adequate marine research was carried out to estimate the actual effects of bottom trawling.⁴⁵

Nevertheless, some RP estimates can be drawn from recent actions taken by the countries opposing moratorium. In 2005, some of these nations began to change their positions. For instance, Iceland, which has always been opposed to any kind of moratorium, declared an area of about eighty square kilometers off-limits to bottom trawling in order to protect cold-water coral. This is seen as an entirely new approach for Iceland.⁴⁶

It was also reported that in 2005, Spain admitted, albeit in internal documents, that bottom trawling was a destructive practice and promised to commission scientific research to assess regions of ocean floor before allowing its fleet to fish there. However throughout 2005, Spain continued to block the EU consensus position in support of a moratorium on deep-sea bottom trawling in international waters.⁴⁷

Seemingly, the RP of countries supporting bottom trawling will continue to fluctuate under growing pressure from both the fishing industry lobby on the one hand, and environmentally-concerned constituencies, on the other. Therefore, the bottom line RP for this group is likely to focus on resisting any international agreement promoting a bottom trawling ban in areas beyond national jurisdiction. This RP includes opposing the establishment of an international consensus at the UNGA on further developments of international regulation mechanisms, as well as establishment of new RFMOs and other and global entities focusing on enforcing additional rules and regulations.

Fishing Industry

The fishing industry in all countries traditionally has been the strongest supporter of bottom trawling and has opposed any attempts to impose a ban on this fishing technique. The industry is represented by International Coalition of Fisheries Associations (ICFA). This is an umbrella organization of sixteen groups, each of which represents hundreds of companies in various countries (see Appendix III).

According to the ICFA policy paper on bottom trawling issued in 2005, more than ninety percent of all fishing activity in member countries takes place within national EEZs, and bottom trawling accounts for more than sixty percent of production. ICFA understands bottom trawling to be a “sustainable fishing method contributing to global food supply and security” and “rejects assertions that trawling is a destructive fishing practice.”⁴⁸ The fishing industry’s AP cannot be any clearer than this statement.

Interestingly, though, there seems to be some movement observed within the fishing industry itself. There is a growing concern among fishermen that in the long run, bottom trawling may lead to the collapse of worldwide fisheries. It appears they have been

⁴⁵ Ibid.

⁴⁶ The Deep Sea Conservation Coalition, “Momentum in support of a moratorium on high seas bottom trawling continues to grow,” http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf.

⁴⁷ Ibid.

⁴⁸ International Coalition of Fisheries Associations, *Policies*, “Bottom Trawling 2005,” <http://www.icfa.net/policies-index.cfm>.

influenced by the supporters of a bottom trawling ban who argue that the current fishing industry position is producing disproportionately devastating effects on ocean ecosystems, negatively affecting the entire fish population, thus the fishing industry in general.⁴⁹ As a result, many independent fishermen have recently begun to recognize the need to move away from bottom trawling and to support efforts to address the adverse effects of this practice.⁵⁰ Most recently, some of the fishing companies began reconsidering their position in light of the growing public attention to the issue.⁵¹ Nonetheless, such moves are limited, as some observers correctly point out that most fishermen are unwilling to voluntarily halt bottom trawling. In the absence of government regulation, abandoning the practice only means they will be beaten by those fishermen who continue to trawl.⁵² Therefore, environmental concerns within the fishing industry do not seem to affect their AP to a significant degree. In principle, the AP stands against the prohibition of bottom trawling.

As for its RP, the fishing industry needs to limit the amount of free-bottom trawling zones as much as possible. In past negotiations, it has been observed that the fishing industry frequently blocks discussions by criticizing and attacking scientific research with a potentially negative effect to the fishing business. ICFA indicates that RP measures include encouraging the UNGA to involve experts from the FAO in seeking technical and scientific advice on bottom trawling issues.

In early 2006, the international fishing industry appeared to seize the initiative in the bottom trawling debate, at least temporarily.⁵³ In early 2006, New Zealand announced that one-third of offshore waters will be declared off-limits for bottom trawling, creating the world's largest area closed to bottom trawling. Reportedly, this decision came as a result of an unprecedented deal with major fishing companies. New Zealand's Fisheries Minister called the agreement "an unprecedented win-win for conservationists and fishermen."

Meanwhile, the vice president of ICFA, Mr. Javier Garat Perez, said that "it makes no sense" to impose a global moratorium. He argued that instead of pursuing a ban as a solution, governments should be making more efforts to regulate illegal fishing.⁵⁴

⁴⁹ UNGA, A/59/122, "Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting," p. 18 (1 July 2004); Richard Black, "Call to ban destructive fishing," *BBC News*, 4 Oct. 2005, <http://news.bbc.co.uk/1/hi/sci/tech/4308156.stm>.

⁵⁰ The Deep Sea Conservation Coalition, "Momentum in support of a moratorium on high seas bottom trawling continues to grow," http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf; Amos, Jonathan, "Deep-sea corals protection call," *BBC News*, 16 Feb. 2004, <http://news.bbc.co.uk/1/hi/sci/tech/3491501.stm>.

⁵¹ Bathgate, Adrian. "Fishing industry 'proactive' in bottom trawling move," *Dominion Post (Fairfax New Zealand)*, 20 Feb. 2006.

⁵² Amos, Jonathan "Deep-sea corals protection call," *BBC News*, Feb. 16, 2004, <http://news.bbc.co.uk/1/hi/sci/tech/3491501.stm>.

⁵³ Dover, Mic. "Destructive fishing ban for NZ," *BBC News*, 21 Feb. 2006, <http://news.bbc.co.uk/2/hi/science/nature/4735474.stm>.

⁵⁴ Rizvi, Haider. "No Consensus for Moratorium on Bottom Trawling," *Inter Press Service News Agency*, 30 May, 2006, <http://www.ipsnews.net/news.asp?idnews=33426>.

Environmental NGOs

The AP of environmental NGOs' is in a declaration by the UNGA requesting an overall and comprehensive ban on high seas bottom trawling until legally binding regulations are implemented.⁵⁵ Environmental NGOs have been lobbying the UN extensively to achieve their aim.⁵⁶ At the end of 2004, the Deep Sea Conservation Coalition urged the UN to declare a global moratorium on bottom trawling as soon as possible.⁵⁷ More recently, several environmental groups, particularly in Europe, began taking legal action against certain States for failure to enforce adequate protection mechanisms.⁵⁸ Some environmental NGOs, such as the International Union for the Conservation of Nature and Natural Resources obtained Permanent Observer status with the UNGA and have been actively criticizing unregulated bottom trawling practices, and urging the Member States to review their policies in order to advance their AP.⁵⁹

In the absence of a law enforcement mechanism, the UNGA resolution on a global moratorium is the strongest card that the NGOs can play. However, given its unlikely occurrence, their RP is at least to secure the UNGA's support for a temporary ban on bottom trawling on the high seas.⁶⁰

The Scientific Community

The scientific community has consistently opposed bottom trawling. This is due to the common understanding in the scientific community that, aside from being very fragile, deep-water ecosystems are also extremely valuable for scientific research. For instance, it is reported that each year scientists find hundreds of previously unknown species in deep-water coral reefs.⁶¹ In February 2004, more than 1,100 marine scientists signed a statement calling on the UN and world governments to stop the destruction of deep-sea coral and to impose a moratorium on bottom trawling.⁶²

⁵⁵ Earth Negotiation Bulletin, "Summary of the working group on marine biodiversity beyond areas of national jurisdiction: 13-17 February 2006," Vol. 25, No. 25, Feb. 2006, <http://www.iisd.ca/vol25/enb2525e.html>.

⁵⁶ Black, Richard. "Deep-sea trawling's 'great harm'," *BBC News*, 6 Oct. 2004, <http://news.bbc.co.uk/1/hi/sci/tech/3719590.stm> (stating that the Deep Sea Conservation Coalition includes Conservation International, Greenpeace International, World Conservation, the Marine Conservation Biology Institute, the Natural Resources Defense Council, and the New England Aquarium, among others).

⁵⁷ Ibid.

⁵⁸ See, e.g. McKimm, Mike. "Mussels dilemma for minister," *BBC News*, 1 Dec. 2003, http://news.bbc.co.uk/1/hi/northern_ireland/3254654.stm (discussing possible fines by the European Commission against Northern Ireland).

⁵⁹ IUCN (the World Conservation Union), "Statement to the United Nations General Assembly, Sixty-first Session, Agenda Item 71: Oceans and the law of the Sea," http://intranet.iucn.org/webfiles/doc/IUCNPolicy/Statements/UN/2006_DEC_UNGA_61th_AgendaItem71_OCEAN_LAW_OF_SEA.pdf.

⁶⁰ Earth Negotiation Bulletin, "Summary of the working group on marine biodiversity beyond areas of national jurisdiction: 13-17 February 2006," Vol. 25, No. 25, Feb. 2006, <http://www.iisd.ca/vol25/enb2525e.html>.

⁶¹ Black, Richard "Deep-sea trawling's 'great harm'," *BBC News*, 6 Oct. 2004, <http://news.bbc.co.uk/1/hi/sci/tech/3719590.stm>.

⁶² Ibid.

Therefore, their AP and RP almost mirror those of the environmental NGOs. Scientists, however, are not as active as NGOs in pursuing their interests. Scientists frequently find themselves in a position requiring neutrality as they provide independent analysis and research to various actors, including governments and the UN. NGOs often refer to scientific findings as the ultimate proof of the adverse impacts of bottom trawling fishing.

International Institutions and Regulatory Bodies

Due to the fact that there are very few government restrictions on bottom trawling, international and regional regulatory bodies have an opportunity to play a significant role in addressing this issue.⁶³ From the UN's point of view, its AP is to agree on the resolution addressing short-term objectives, creating a basis for later improvements. In November 2005, the UNGA reaffirmed its call for nations to take "urgent action" to protect deep-sea coral and organisms from destruction by bottom trawling. It was decided, however, to postpone consideration of moratorium until 2006.⁶⁴ For this purpose, several international organizations, including the World Wildlife Fund (WWF) and some of the UN bodies, have expressed their support for a ban on bottom trawling by the end of 2006.⁶⁵

The RP of international institutions is to increase the level of coordination and participation of relevant international organizations. They suggest that there is ample room to improve negotiations by incorporating important Working Group stakeholders, namely the International Maritime Organization (IMO), FAO, and major RFMOs.⁶⁶ Their participation is not only essential for the management of fishery bodies, but also necessary to secure the financial resources necessary to improve implementation and address a governance gap.

⁶³ "Bottom trawlers decried as ocean clearcutters," *CNN*, 15 Dec. 1998, <http://www.cnn.com/TECH/science/9812/15/bottomtrawlers.yoto/index.html> (discussing lack of government restrictions on bottom trawling).

⁶⁴ The Deep Sea Conservation Coalition, "Momentum in support of a moratorium on high seas bottom trawling continues to grow," http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf.

⁶⁵ The Deep Sea Conservation Coalition, "Bottom trawling continues unrestricted as international fisheries meeting ends," 17 Feb. 2006, <http://www.savethehighseas.org/display.cfm?ID=94>; UNGA, A/59/122, "Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting," pp. 3 & 20 (1 July 2004) (proposing that the General Assembly encourages "regional fisheries management organizations with a mandate to regulate bottom fisheries to urgently address the impact of deep sea bottom trawling"); The Deep Sea Conservation Coalition, "Momentum in support of a moratorium on high seas bottom trawling continues to grow," http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf (discussing position of UN Task Force on Environmental Sustainability of the Millennium Project and the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS)); See also Official record of United Nations Convention on the Law of the Sea meeting, SPLOS/135, pp. 15 & 18 (25 July 2005).

⁶⁶ The Deep Sea Conservation Coalition, "Momentum in support of a moratorium on high seas bottom trawling continues to grow," http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf (discussing position of UN Task Force on Environmental Sustainability of the Millennium Project and the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS)).

A critical vulnerability of the international institutions and regulatory bodies is that, due to the lack of enforcement mechanisms and comparatively weak internal structures, they tend to leave the leading role on the international arena to regional bodies such as the EU. Until few years ago, the EU was referred to as the “single largest obstacle to obtaining a high seas bottom trawling moratorium.”⁶⁷ Since the EU member states had to come to a common denominator and put forward a collective position on this issue, and Spain played a significant role in determining the EU’s stance against any kind of moratorium, the EU had to advocate a more cautious and case-by-case approach when discussing measures aimed against bottom trawling.⁶⁸

However, in the last two years, several EU countries began to call for a more aggressive anti-bottom trawling position.⁶⁹ As a result, the EU has begun to criticize bottom trawling, calling for immediate measures to address it.⁷⁰ In 2005, the EU adopted a permanent ban on all deep-water bottom trawling in a 200-mile zone around the Azores, Madeira, and the Canary Islands, covering several hundred thousand square kilometers.⁷¹ Nevertheless, no specific measures for achieving a global ban on bottom trawling have been put forth by the EU, not even during the international fisheries meeting held in New Zealand in February 2006.⁷²

Public

Public opinion regarding bottom trawling is a key factor in these negotiations, and its influence can only be expected to grow.⁷³ Increasing public awareness regarding the destructive consequences of bottom trawling could cause significant shifts in government policies. An informed public can exercise economic pressure by refusing to purchase sea products obtained through bottom trawling.

For example, Canadian public opinion surveys conducted in 2005 showed that about eighty percent of the population surveyed supported a moratorium on high-seas bottom trawling. The government of Canada began changing its position on a moratorium

⁶⁷ The Deep Sea Conservation Coalition, “Bottom trawling continues unrestricted as international fisheries meeting ends,” 17 Feb. 2006, <http://www.savethehighseas.org/display.cfm?ID=94>.

⁶⁸ The Deep Sea Conservation Coalition, “Momentum in support of a moratorium on high seas bottom trawling continues to grow,” http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf; The Deep Sea Conservation Coalition, “New European Union Position Justifies High Seas Bottom Trawling Moratorium,” 16 Feb. 2006, <http://www.savethehighseas.org/display.cfm?ID=93>.

⁶⁹ Ibid

⁷⁰ The Deep Sea Conservation Coalition, “Bottom trawling continues unrestricted as international fisheries meeting ends,” Feb. 17, 2006, <http://www.savethehighseas.org/display.cfm?ID=94>; The Deep Sea Conservation Coalition, “New European Union Position Justifies High Seas Bottom Trawling Moratorium,” 16 Feb. 2006, <http://www.savethehighseas.org/display.cfm?ID=93>.

⁷¹ The Deep Sea Conservation Coalition, “Momentum in support of a moratorium on high seas bottom trawling continues to grow,” http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf.

⁷² The Deep Sea Conservation Coalition, “Bottom trawling continues unrestricted as international fisheries meeting ends,” 17 Feb. 2006, <http://www.savethehighseas.org/display.cfm?ID=94>; The Deep Sea Conservation Coalition, “New European Union Position Justifies High Seas Bottom Trawling Moratorium,” 16 Feb. 2006, <http://www.savethehighseas.org/display.cfm?ID=93>.

⁷³ “Bottom trawlers decried as ocean clearcutters,” *CNN*, 15 Dec. 1998, <http://www.cnn.com/TECH/science/9812/15/bottomtrawlers.yoto/index.html>.

proposal, although the Canadian fishing industry has been lobbying hard against it.⁷⁴ These changes in government policy and stance were largely due to significant public pressure expressed in the media, as well as extensive campaigns conducted by environmental NGOs.

SCENARIO ANALYSIS

Zone of Possible Agreement

Considering the APs and RPs of all parties the spectrum of negation arguments ranges from an immediate global moratorium to absolutely no restrictions on bottom trawling. The latest negotiation rounds at the UNGA demonstrate that neither of these two extremes is likely to gain the UNGA consensus anytime soon. Therefore, just setting a zone of possible agreement (ZOPA) for all Member States involves complex discussions over sovereign rights and national priorities, followed by bargaining and a trading of interests. For instance, Palau, one of the strongest global moratorium supporters, has expressed support for Japan's permanent membership at the Security Council in order to secure a shift in Japan's policies towards bottom trawling practices in the Pacific Ocean.

Given these circumstances, a tactical way to create a ZOPA is to start by identifying the areas of special biological significance that urgently need stricter regulatory and enforcement activity. Ideally, the ZOPA should steadily widen the range of issues it addresses. Proposals made at the Working Group meetings and informal, open-ended consultations are providing opportunities to engineer the gradual inclusion of more challenging issues. This, combined with a regular process of global reporting (ideally under a UN framework) and an assessment of the state of the marine environment, the moratorium discussions should advance towards a possible agreement. In addition, formulating a feasible discussion agenda and scheduling a realistic timeline are important components, which should be carefully taken into account due to the immediate need to connect to international actions. The negotiations are unlikely to conclude soon. However, if the purpose of the international discussions is to protect the rapidly vanishing deep-sea marine biodiversity, it is essential that bottom trawling be addressed in a timely manner.

The United Nations General Assembly

Despite the criticism over implementation and a governance gap, the general trend will be for international organizations and regulatory bodies to play a very important role in the future bottom trawling negotiations. As Working Group participants have demonstrated, the UNGA is regarded as the star player matters beyond national jurisdiction.⁷⁵ This is an opportunity for the UNGA and other UN programs, agencies, and funds to propose the enhancement of existing regulations and instruments. However, the negotiation participants are interested in a focused agenda that covers all relevant issues.⁷⁶

⁷⁴ The Deep Sea Conservation Coalition, "Momentum in support of a moratorium on high seas bottom trawling continues to grow,"

http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf.

⁷⁵ Earth Negotiation Bulletin, "Summary of the working group on marine biodiversity beyond areas of national jurisdiction: 13-17 February 2006," Vol. 25, No. 25, Feb. 2006, <http://www.iisd.ca/vol25/enb2525e.html>.

⁷⁶ Ibid.

The diversity of APs and RPs amongst the stakeholders will require UNGA participants to work toward producing several resolutions within the ZOPA, targeting both short-term and long-term goals in the course of future negotiations. The RP set by the UNGA will serve as the short-term goal for the interim measures aimed at providing protection to the marine ecosystems, particularly those that are the most vulnerable, and significant underwater structures. The AP will be set as the advancement of the long-term negotiations aimed at a complete moratorium on bottom trawling and the achievement of the Millennium Development Goals (MDGs) for the protection of ecosystems and sustainable development by 2015.

The Short-Term Process

The UNGAs short-term resolution, aiming to protect sensitive areas and support commercial fisheries, is more likely to gain support from the Member States and Permanent Observers given their diverse positions. It would be pragmatic to base the draft proposals on the agreed upon elements from the Working Group meeting in February 2006 and at the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (Consultative Process). The principle instrument that the UNGA can exercise is UNCLOS. Aside from disagreements regarding the ongoing discussions under the auspices of the UNGA, participants agree on using UNCLOS as a universal law applicable to all activities in the sea. Perception of UNCLOS as a recognized common tool helps the UNGA to pursue the short-term goals.

Therefore, the first steps to a partial or regional prohibition on bottom trawling include focusing on short-term measures. Future UNGA resolutions on this topic could include: (i) distinguish commercial areas and areas with little or no economic impact to fishery industry; (ii) identify which areas are most sensitive and need urgent protection, i.e., the areas with precious or rare coral and sponge gardens – essential to a diversity of fish and crab; (iii) identify the areas that have little economic importance to fisheries due to a complex structure of the seafloor unsuitable for dragging the fishery nets; (iv) determine the portion of sea areas with habitat of particular concern; (v) establish an experimental closed area where no bottom trawl, dredge, pot, or trap will be used for certain period of time;⁷⁷ (vi) study commercial interests in deep seabed genetic resources, which have potential economic benefits to pharmaceutical industry; (vii) consider other existing conventions and instruments as complementary regulatory means; (viii) oversee the efficient implementation and capacity building of UNCLOS; (ix) study and determine the implementation and enforcement gap among the Member States; and (x) involve other organizations such as the FAO and RFMOs to address the destructive fishing practices.

The Member States will inevitably face the need to work with their fishery industries to ensure that they shift away from bottom trawling practices. In undertaking such efforts, the governments will likely consider the enhancement of the vessel monitoring systems, effectively used in the U.S. to increase the ability to enforce bottom trawling restrictions in a protected area.⁷⁸

⁷⁷ Marine Protected Areas of the United States, “What is an MPA? – Oculina Experimental Closed Area,” http://www.mpa.gov/what_is_an_mpa/oculina.html.

⁷⁸ Ibid.

The Long-Term Process

Future UNGA resolutions will need to clarify a legal framework, as well as to consolidate institutional coordination among organizations, programs, and agencies both internal and external to the UN system. Also, it will need enforcement of the role of RFMOs as they do not presently have authority to regulate bottom trawling in the most seriously affected high sea areas.⁷⁹ Given the parties' RPs, it is probable that such proposals will be raised repeatedly in the future negotiation process. Additionally, in the long-term, increased public awareness of the environmentally unfriendly effects of bottom trawling might influence the stance of some toward a more environmentally conscious position aimed at protection of marine ecosystems.

In addition to the Working Group's active advancement in the negotiation process, the UN Task Force on Environmental Sustainability of the Millennium Project⁸⁰ sets an incentive for taking additional initiatives. It states, "[G]lobal fisheries authorities must agree to eliminate bottom trawling on the high seas by 2006 to protect seamounts and other ecologically sensitive habitats."⁸¹ Thus, it is possible that in the near future parties will declare a resolution on several short-term objectives within the UNGA framework. These resolutions would be an important foundation for further negotiations aimed at expanding the protected areas.

A ten-year experiment to determine if depleted species would rebound or not could be an extension of the experimentally closed areas, for example. Also, considering the MDGs due in 2015, the UN Development Program (UNDP) will be working under the UNGA to protect marine biodiversity. Coral reestablishment and habitat restoration projects will be a subject in particularly high demand in the long-run. Extending the prohibition of the experimentally closed areas for an indefinite period will get very close to the UN's AP.

The long-term benefits of a bottom trawling moratorium or ban, such as insurance against the uncertainty of stock assessments, are currently supported by NGOs, as well as by the projects at the Marine Protected Areas of the U.S.⁸² In order to stimulate the opponent actors to move toward the center of the ZOPA, economically proving that the estimates of the long-term benefits outweigh the short-term costs of opening the area to harvest will be a tactical way. Moreover, the scientific community could play an important role in pulling the actors far outside the ZOPA to a closer position.

CONCLUSION

Overall, the negotiation process on bottom trawling will be able to advance only step-by-step, due to the actors' diverse views and interest vis-à-vis identified biological, social, and economic concerns. Given the complexity of multilateral negotiations at the UN, the actors will most likely pursue a mixture of short-term and long-term approaches, concurrently.

⁷⁹ Ibid.

⁸⁰ It is an independent advisory body commissioned by UN Secretary-General Kofi Annan to advise the UN on strategies for achieving the MDGs.

⁸¹ The Deep Sea Conservation Coalition, "Momentum in support of a moratorium on high seas bottom trawling continues to grow," http://www.savethehighseas.org/publicdocs/Political_Momentum_Addendum.pdf.

⁸² Marine Protected Areas of the United States, "What is an MPA? – Oculina Experimental Closed Area," http://www.mpa.gov/what_is_an_mpa/oculina.html.

For this path to result in UNGA resolutions, improvements in regional and international cooperation need to occur.

The most likely future path of bottom trawling negotiations will not permit any party to achieve their APs anytime soon. A collective action on a global moratorium on bottom trawling pursued by a number of Member States and environmental NGOs will remain a very ambitious goal. Similarly, keeping the bottom trawling practices untouched as advocated by the opponents of the moratorium will no longer be feasible as a growing number of Member States are already taking domestic measures to protect their waters from damages caused by bottom trawling.

Finally, it is estimated that sooner or later, countries opposing moratorium will need to gradually begin adopting proposals made at the UNGA, such as the establishment of scientific expert committees and participation in the Working Group and Consultative Process activities. This does not mean that the negotiations will steadily move towards the moratorium supporters' goals. States strongly opposing the bottom trawling ban and fishing industry are likely to maintain firm positions against trawling restrictions in international waters.

APPENDIX I

Regional Fisheries Management Organizations (RFMOs)

Note: The two RFMOs in italics are under the development process.

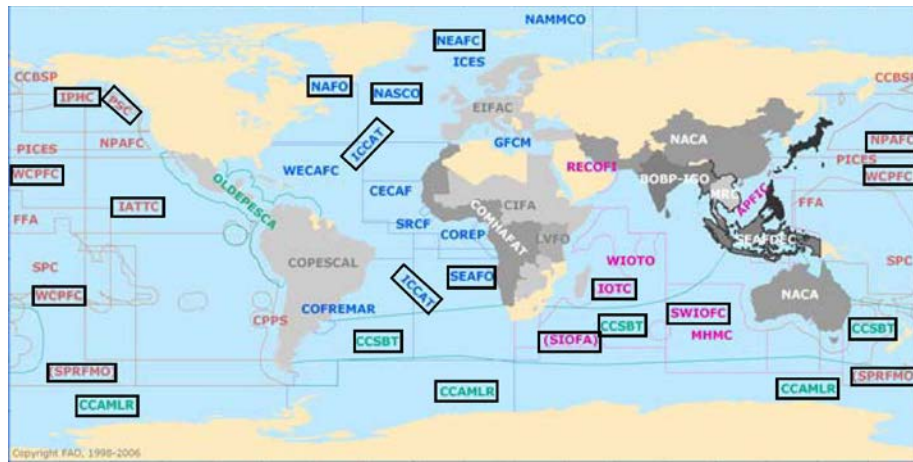
CCAMLR	Commission for the Conservation of Antarctic Living Marine Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
GFCM	General Fisheries Commission for the Mediterranean
IATTC	Inter-American Tropical Tuna Commission
IBSFC	International Baltic Sea Fishery Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IOTC	Indian Ocean Tuna Commission
IPHC	International Pacific Halibut Commission
IWC	International Whaling Commission
NAFO	Northwest Atlantic Salmon Conservation Organization
NASCO	North Atlantic Salmon Conservation Organization
NEAFC	North-East Atlantic Fish Commission
NPAFC	North Pacific Anadromous Fish Commission
PSC	Pacific Salmon Commission
SEAFO	Southeast Atlantic Fisheries Organization
<i>SIOFA</i>	<i>South Indian Ocean Fisheries Agreement</i>
<i>SPRFMO</i>	<i>South Pacific Regional Fisheries Management Organization</i>
SWIOFC	Southwest Indian Ocean Fisheries Commission
WCPFC	Western and Central Pacific Fisheries Convention

Source: FAO, "Regional Fishery Bodies – Management Bodies,"
http://www.fao.org/fi/body/rfb/chooseman_type.htm.

APPENDIX II

Regional Fisheries Bodies – World Ocean Coverage

Note: The RFMOs are indicated in squares. Not all RFMOs listed above are included in this map.



Source: FAO, "Regional Fishery Bodies – World ocean coverage,"
http://www.fao.org/fi/body/rfb/Big_RFB_map.htm.

APPENDIX III

International Coalition of Fisheries Associations (ICFA)

- All Russia Association of Fisheries, Entrepreneurs & Exporters (VARPE)
- ASEAN Fisheries Federation
- Australian Seafood Industry Council
- Europeche
- Federación Española de Organizaciones Pesqueras (FEOPE)
- Fisheries Association of Iceland
- Fisheries Council of Canada
- Japan Deep Sea Trawlers Association
- Japan Fisheries Association
- Korea Fisheries Association
- National Fisheries Institute
- New Zealand Seafood Industry Council
- Organization for the Promotion of Responsible Tuna Fisheries (OPRT)
- Sociedad Nacional de Pesca (SONAPESCA)
- Taiwan Fisheries Association
- The Norwegian Fisherman's Association

Source: International Coalition of Fisheries Associations, "Members,"
<http://www.icfa.net/>.

APPENDIX IV

United Nations Convention on the Law of the Sea (UNCLOS)

- Adopted at the United Nations General Assembly: 10 December 1982
- Entered into force: 16 November 1994

PARTIES (152)

Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, The Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belarus, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Burma, Cameroon, Canada, Cape Verde, Chile, People's Republic of China, Comoros, Democratic Republic of the Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Egypt, Equatorial Guinea, Estonia, European Union, Fiji, Finland, France, Gabon, The Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kiribati, South Korea, Kuwait, Laos, Latvia, Lebanon, Lithuania, Luxembourg, Former Yugoslav Republic of Macedonia, Madagascar, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Federated States of Micronesia, Monaco, Mongolia, Montenegro, Mozambique, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Nigeria, Niue, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Qatar, Romania, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, São Tomé and Príncipe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Tanzania, Togo, Tonga, Trinidad and Tobago, Tunisia, Tuvalu, Uganda, Ukraine, United Kingdom, Uruguay, Vanuatu, Vietnam, Yemen, Zambia, Zimbabwe.

COUNTRIES THAT HAVE SIGNED, BUT NOT YET RATIFIED (26)

Afghanistan, Bhutan, Burundi, Cambodia, Central African Republic, Chad, Colombia, Republic of the Congo, Dominican Republic, El Salvador, Ethiopia, Iran, North Korea, Lesotho, Liberia, Libya, Liechtenstein, Malawi, Morocco, Niger, Rwanda, Swaziland, Switzerland, Thailand, United Arab Emirates, United States.

COUNTRIES THAT HAVE NOT SIGNED (18)

Andorra, Azerbaijan, Ecuador, Eritrea, Israel, Kazakhstan, Kyrgyzstan, Moldova, Peru, San Marino, Syria, Tajikistan, Timor-Leste, Turkey, Turkmenistan, Uzbekistan, Vatican City, Venezuela.

Source: Wikipedia, "United Nations Convention on the Law of the Sea,"
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SHIP-BREAKING IN INDIA: FUTURE CONFLICT SCENARIOS

Manish Kumar

ABSTRACT

Ship breaking in developing countries is one of the pressing environmental issues of our time. This chapter analyses the multilateral nature of ship-breaking conflicts in India. It focuses on the competition between complex multilateral regimes and multiple stakeholders with conflicting interests. The author describes the conflict, identifies actors and analyzes their competing interests. Positions taken by various actors not only reflect the conflicts between current economic and environmental realities, they also demonstrate the immense complexities of multilateral regimes and the need for negotiations through the entire process.

The author has been professionally involved with this issue for brief period of time and see this case as example of future conflict elsewhere. These conflict scenarios are the result of multiple strategies adopted by seven groups of actors involve in the issue. The objective of the author is to integrate the theoretical elements of multilateral negotiations and a personal engagement with this issue to further bridge the gap between literature on the topic and the real issues of multilateral conflicts.

INTRODUCTION

This paper analyses future conflict scenarios in a key environmental issue: ship-breaking in India. The analysis focuses on ship-breaking in India beginning with a brief overview of the issue with an analysis of the current situation and the position of multiple actors. From there future scenarios are developed based on plausible strategies and tactics adopted by the different parties, leading to a summary conclusion.

SHIP-BREAKING & SHIP-BREAKING IN INDIA

Every ship reaches its end of its life after 25 to 30 years, at which point it is called an “end-of-life vessel” and sold for dismantling, in order to recover tons of steel. While a ship is comprised of about 95% steel, it also contains large amounts of hazardous materials.

In the 1970s, ship-breaking was concentrated in Europe. Performed at docks, it was a highly mechanized industrial operation. As the costs of upholding environmental, health and safety standards increased in Europe, the ship-breaking industry moved to poorer Asian countries, including India, Bangladesh, China, Pakistan and Turkey, where many pristine beaches were converted into ship-breaking yards.

On the western coast of India is Alang, one of the largest ship-breaking yards in the world. Dismantling ships, particularly single-hull tankers used for transporting oil, releases toxic waste into the environment and amongst this, workers scrap the ships without any protection. According to the International Labour Organization (ILO), ship-breaking “...is one of the world's most unregulated industries leaving a swath of debris, disability and even death in its wake. But for countries like India and Bangladesh, ship-breaking

provides jobs and resources that it cannot afford to lose.”¹ Meanwhile, ship-owners stand to gain an average profit of US \$1.9 million² per end-of-life vessel scrapped.

Every year around 600 to 700 larger sea vessels are taken out of service and sent to Asia for scrap. India accounts for 60 percent of this market. In the 1990s they had an aggregate tonnage of around 15 million dwt a year. However, the scrap market increases and will increase substantially the following years. In 2001 the total number of vessels (608) sold for scrap already totaled a figure of 28 million dwt. This marks a year on year growth of nearly 25%.³

THE CONFLICT

The Basel convention laid down regulations stating that ships constructed using toxic substances are considered hazardous waste, and cannot be exported for dismantling without first being stripped of their dangerous substances. One conflict arises between ship-owner countries, the shipping industry, and environmental groups, and canters on legal provisions of the Basel convention. For example, environment groups claim that ship-owners blatantly violate the Basel Convention by transporting their toxic vessels to countries such as India, releasing toxins into the environment and wreaking havoc with the health of the people and damaging the ecosystem. Meanwhile, the governments of affected countries are concerned with promoting themselves as cheap scrapping yards in order to provide a livelihood for their population.

One of the latest examples is the dispatch of the aircraft carrier *Clemenceau* from France to the world's largest ship graveyard on India's west coast for scrapping. This has brought new attention on the human and environmental dangers inherent in ship-breaking. After huge opposition from different NGOs, the local labour union (CITU), plus pressure from the international media, the French Government recalled the *Clemenceau* from India. However, the basic social issues remain unaddressed, in particular worker safety, and the protection of environmental norms and regulations adopted and agreed upon by the international community. As previously mentioned, in 2001 there were over 600 end-of-life vessels⁴ sent to Asia for scrapping and this trade is expected to increase. Most these end-of-life vessels are single-hull tankers, which were banned as of April 2005⁵ according Basel Convention. This will result in more than 2,000 tankers taken out of the water over the next few years to be scrapped, ending up in Asia and primarily India for dismantling.

While part of the conflict rests on the interpretation of the Basel Convention, another part of the conflict stems from economic and social trade-offs. On one hand, ship-breaking provides a major source of employment to poor and migrant laborers in India.⁶ On the other hand, ship-breaking is dangerous work and a cause of death from work-place

164 <http://www.ilo.org/public/english/protection/safework/sectors/shipbrk/film/index.htm>

2 E.A. Gibson, Shipbrokers., Annual Report, 2004

3 ibid

4 http://www.greenpeaceweb.org/shipbreak/basel_convention_shipb.asp

5. See Basel Convention <http://www.basel.int>

6. A Survey on Working and Socio-Economic Conditions of Ship-breaking Workers in India, IMF-FNV project in India 2004-2007 http://www.imfmetal.org/main/files/06042810465779/Ship-breaking_survey.pdf

accidents. It is also the source of acute and chronic health problems stemming from exposure to hazardous substances, such as asbestos.⁷

THE STAKEHOLDERS

For such international organizations as the International Maritime Organization (IMO) and the ILO, pollution, toxic trade, and worker safety are core issues with respect to the ship-breaking industry. The Indian government classifies ship-breaking as a manufacturing industry and realizes it is low-cost steel source. Ship-owners make millions of dollars by selling their end-of-life vessels for scrap metal, and hence have a strong on-going economic interest. NGOs, groups such as the BASEL Network, and other civil society actors strongly advocate the environmental aspect of this business, opposing any kind of movement or trade of toxic substances from developed to developing countries. Due to this multiplicity of interests and issues, it is important to introduce the actors and their positions.

The primary stakeholders in this conflict are:

- Ship-owners and the ship-breaking industry
- International Organizations (e.g., ILO and IMO)
- The Government of India; the European Union (EU)
- Environmental groups, Non-governmental organizations (NGOs), civil society groups (i.e., Basel Action Network and CITU)

International organizations

International Maritime Organization (IMO): The IMO is the United Nations (UN) body that regulates the shipping industry. It was established in 1959 to improve the safety at sea and prevent marine pollution. The IMO has more than 130 member nations and is based in London.

International Labour Organization (ILO): the ILO is the UN specialized agency seeking the promotion of social justice and internationally recognized labour standards. While it believes that ship recycling can contribute to sustainable development, it advocates this through the minimization of the environmental, safety and occupational health risks related to the ship dismantling process.

International conventions and regulations

The Basel Convention: The Basel Convention (1989) was initiated by the UN Environmental Program. It came into force in 1992. It regulates international trade in hazardous waste aiming to minimize its generation and transboundary movement. Illegal transports are considered criminal and must be returned to sender. More than 100 countries⁸ have ratified this convention. Basel Convention provisions can be applied to old ships, which are sold as scrap in their end of life. It is important to mention here that generally every ship has 28 to 30 years life span. Within their structure, ships contain hazardous

7. See list of Toxic Substances. Current Status of Ship breaking in India, By Gopal Krishna , <http://india.indymedia.org/en/2006/01/211353.shtml>

8 See Basel Network <http://www.basel.int>

materials hence when they are sold for scrap they are considered to fall under the Basel Convention.

European Waste Shipment Regulation: The European Waste Shipment Regulation (EWSR) or Council Regulation 259/93/EEC⁹ is the European mechanism for regulating the export of waste. This concerns the supervision and control of waste shipments of into, within, and out of the EU Member States. The EWSR transposes the provisions of the Basel Convention related to transboundary movements of hazardous waste and their disposal. It also regulates the export of end-of-life vessels as confirmed by a June 2002 ruling of the Council of State in the Netherlands.

Coalitions of civil society, NGOs, and others

Basel Ban: This is a coalition of developing countries, Eastern and Western European nations, with Greenpeace. Critical of the Basel Convention, they denounced it as an instrument serving to legitimize trade in hazardous waste rather than to prohibit what many felt was a criminal activity. In 1994, this coalition managed to pass by consensus what has come to be known as the “Basel Ban.”

Government

The Government of India: Ship-breaking grew into a full-fledged industry by 1979,¹⁰ when the Government of India recognized it as a manufacturing industry. This manufacturing industry yields 2.5 million tonnes of steel, representing ten per cent of India's overall steel production. According to the junior Federal Environmental Minister of India, “there is no significant hazard to the environment through ship-breaking,” citing a study conducted by a government-owned consultant firm, MECON.¹¹

Industry representatives

The Centre of Indian Trade Unions (CITU): CITU is one of the biggest assemblies of workers in India. With a membership of six million spread out in the organized sectors of rail, postal, telecom, banking, and insurance, as well as the unorganized sectors of construction workers, bidi workers, and day-laborers, it has joined the chorus against the scraping of *Clemenceau* in India.

Ship-breakers Association of India: An association of ship-breakers, it is headed by Mr. Nagarsheth. During the ship-recycling summit in June 2001 in Rotterdam, he stated that ship-owners should remove all hazardous items not required for the final voyage.¹²

International Ship-Owners Associations: A ship owner is the person or company who equips and exploits a ship, usually for delivering a cargo and other freight.¹³ In this case,

⁹ hazardous.waste.en.infofx.info

¹⁰ A Survey on Working and Socio-Economic Conditions of Ship-breaking Workers in India ,IMF-FNV project in India 2004-2007 http://www.imfmetal.org/main/files/06042810465779/Ship-breaking_survey.pdf

¹¹ Environmental Bulletin India: Government defends ship-breaking.

¹². <http://www.greenpeaceweb.org/shipbreak/whatis.asp>

¹³. <http://en.wikipedia.org/wiki/Shipowner>

the International Association of Independent Tanker Owners (INTERTANKO)¹⁴ accept the importance of developing an inventory of toxic and hazardous materials prior to final disposal, and similarly of seeking a “green passport”¹⁵ that lists the hazardous items upon delivery of a new ship, to be maintained throughout its life. They have formed a working group aiming to develop a code of practice for operators sending a vessel for recycling. According to INTERTANKO spokesperson, “The Code, together with an inventory of hazardous substances, is seen as the first step by the shipping industry to tackle this problem and is welcomed by the legislators as well as the environmental pressure groups. Both the Code and the inventory are aimed at ensuring a transparency of information in order to increase the health and environmental standards in many of the breaking yards across the world.”¹⁶

STAKEHOLDER DYNAMICS

Each party appears to have competing or conflicting economic, social and strategic interests, yielding a complex situation with seven sets of actors.

They are considered sets because in each group there is more than one particular organisation involved, and hence each set is basically a coalition of actors or organisations. For example, the Government of India set includes not only the Federal Government of India and multiple ministries (notably that of the Environment, Foreign Affairs, and Shipping) but also its Supreme Court and local governments. Similarly, Basel Ban is a coalition of many NGOs and nations who demand responsible ship-breaking with no toxic trade. The international organizations and Conventions – the IMO, ILO, and Basel Convention – are jointly pursuing a regulatory approach and framework for responsible ship-breaking vis-à-vis worker and environment safety. Meanwhile, influential ship-owner’s associations, with strong support from flag countries, are more concerned with profitability and economic incentives from the ship-breaking industry. Local ship-breakers organisations are concerned with their business and other economic incentives. While it is not impossible to find common ground among these interests, the complexity of negotiations in order to do so is significant.

The Zone of Possible Agreement (ZOPA)¹⁷ concept does not work here because there are multiple and simultaneous possible interactions. Figure I demonstrates the possible exchanges between the various sets of actors. This conflict is distinct in many ways from bilateral conflicts. Issue of Ship breaking have motivated International NGOs like Greenpeace and Basel ban to take this issue into the public scrutiny by organizing campaigns and many non violent public protests. International organizations like ILO, IMO and their legal regimes demonstrate overlapping definitions and sometimes conflicting interpretations, thus they are in competition in terms of protecting interests of shipping and labour respectively. On the other hand the ship-breakers association and the ship-owners

14. www.intertanko.com

15. <http://www.intertanko.com/templates/Page.aspx?id=15785>

16. 4TH INDUSTRY MEETING ON SHIP RECYCLING, February 13, 2006,

<http://www.intertanko.com/templates/Page.aspx?id=12483>

¹⁷ Saner Raymond, *The Expert Negotiator*, Martinus Nijhoff Publishers Leiden/Boston 2005; P-108

association are in direct conflict with Indian labour unions and Greenpeace, since their interests differs significantly. The role of the Indian Government becomes very interesting for two reasons. First, given that it has ratified international treaties, it is under obligation to comply. Second, India's Supreme Court has issued a directive on hazardous waste disposal. Despite this, however, the government is under tremendous pressure from both the ship-owners and ship-breakers associations given their economic interests.

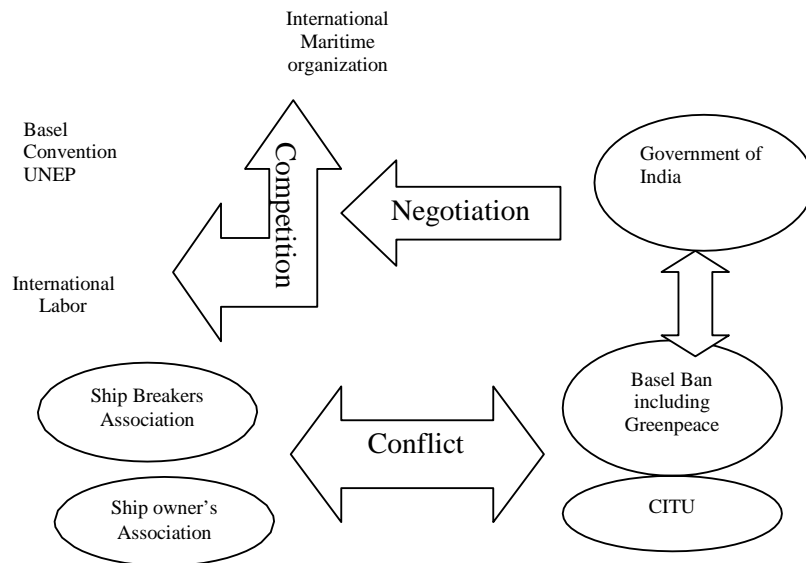


Figure 1: Possible Forms of Interaction between Various Actors

The first issue surrounds the characterization of a ship as toxic waste – i.e., when does a ship cease to being a ship and becomes toxic waste? Clarity on this issue is essential because different parties have different interpretations attached to it and they all use it according to their interest. The Basel Convention defines waste as substances or objects, which are disposed of, or are intended to be disposed of, or are required to be disposed of, by provisions of national law.¹⁸ Disposal is defined as an operation under the Basel Convention Annex IV.¹⁹ A ship, like any other substance or object would thus become waste once intent or requirement to dispose is indicated and the substance or object is destined for an Annex IV operation. Note the Convention does not include in its definition that a substance or object becomes waste once it stops being operational, or when it ceases to operate under its own power. In addition, the Convention does not exempt from the concept of waste substances or objects, which have possible subsequent economic

18. See <http://www.basel.int/text/documents.html>

19. See Ibid

reutilization value. Interpretations that attempt to include these non-existent criteria are without foundation in the letter and spirit of the Convention.

The question “When does a ship cease being a ship and becomes toxic waste?” could be misleading if mutual exclusivity is presumed: a ship can either be a ship or be toxic waste, but it cannot be both simultaneously. However, that a ship can assume at once the status of a vessel and that of waste is a given considering the various international organizations and instruments have simultaneous jurisdiction over ships in the course of their operating life. This is illustrated by the fact that not only the IMO is involved with ships – only logical given its mandate – but that ships are also subject to the Basel Convention, which governs waste.

Due to various loopholes in international law, however, ship-owners can evade regulations. For example, how can an end-of-life vessel be prevented from sailing in international waters when destined for a ship-breaking beach? Another issue that remains vague and hence easily open to interpretation or avoidance is ship responsibility. Which nation is primarily responsible for the vessel? The one that is exporting it? The Port State? The Flag State or the nation in which the ship owner has bases its operations.²⁰

CONFLICT SCENARIOS:

Given the present ambiguous situation and the confusion surrounding the legal terms for toxic, ship, Flag State, exporting and importing State, four conflict scenarios can be developed, based on different strategies and tactics adopted by the various players as summarized in the Figure II. These scenarios are based on multiple strategies adopted by various stakeholders in the future. This creates four possible outcomes, the basis for which are identified through past strategies of various stakeholders, as well as their degrees of resilience in the face of changing game rules.

Each of these scenarios is equally plausible as they are designed based on realistic developments in the international environment. In Figure 2, the scenarios are arranged on two axes where the main variables are international and local factors. International factors include integrative strategies adopted by three key international stakeholders – the IMO, ILO and Basel Convention – in the upper portion of the Y axis. The lower half of the Y axis is a region where there is no cooperation between international organizations.

The X axis is a demonstration of degrees of political will by the Indian government to promote clean ship-breaking practices. To the right there is high degree of political will, and to the left there is less political commitment.

Scenario 1: Status quo

This scenario is reasonably similar to the current situation where there is a common set of rules but conflict of interest in their application. All three international organizations start working in close cooperation but there is no rule enforcement by appropriate authorities. Lack of political will is clearly demonstrated by the Indian Government, which views ship-breaking as a manufacturing industry and does not move to ensure safe working conditions for its people. In this case civil society groups are the drivers who proactively try to enforce the international regulations for clean and safe ship-breaking. Ship-owners act like brakes to civil society, as they try to protect their economic interests. International organizations can be considered “conductors” with a neutral position. These positions were evident in

20. See annex for definitions

the *Clemenceau* case. Here, role of international organizations remained minimal and it was Greenpeace and Basel Ban who took active roles in raising the profile of the issue and succeeded in provoking change. Initially, both the Indian and French governments tried to move forward with the sailing of the *Clemenceau* towards an Indian ship-breaking yard but due to heavy international pressure and public opinion in both nations, the French president called back the ship.

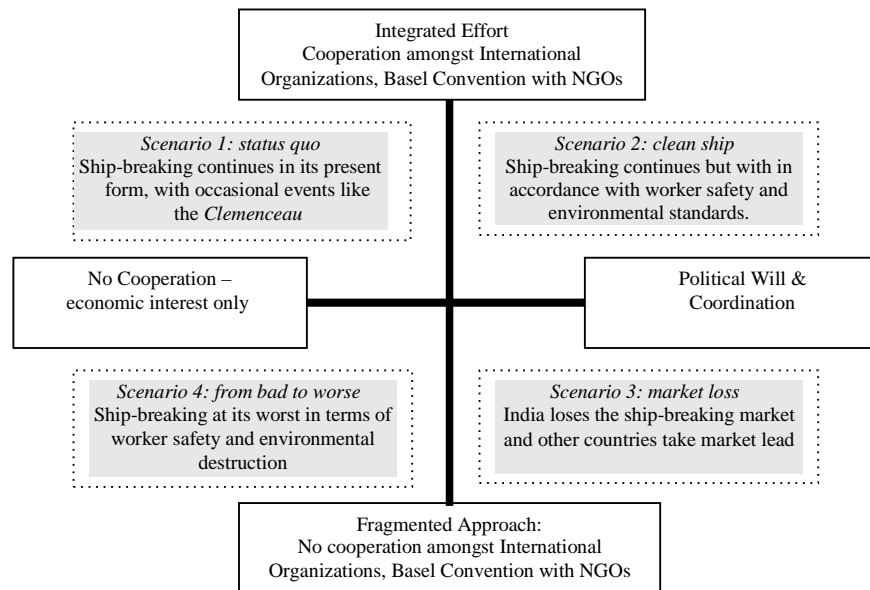


Figure 2

Scenario 2: Clean Ship

This is the ideal ship-breaking scenario for India. Here, the IMO, ILO, and Basel Convention work in synchrony through joint working groups whose members include representatives from India, Basel Ban, and industry associations. It requires cooperation amongst all the actors involved. A governance mechanism for clean and safe ship-breaking would be established through the harmonization of rules and the efforts of international organizations. At the local level, the Indian Government cooperates and demonstrates strong political will to promote and sustain a cleaner industry. Rather than different and fixed international regulations regarding ship-breaking in this scenario there is common agreement and one single regulatory document that everyone can follow. The goal is a common and clear framework where individual parties do not need to define, interpret or implement terms and actions themselves or as they see fit. Strategically, all parties are required to be accommodative, and to promote constructive collaboration.²¹ Ship-owners,

21. Saner, Raymond., *The Expert Negotiator*. Martinus Nijhoff Publishers Leiden/Boston 2005; p. 108

ship-breakers, environmental groups such as Greenpeace, large actors like the Government of India, and local players such as CITU also must be cooperative with each other and willing to compromise. Ship-owners are at the lead in the chain of responsibility for the safe and clean dismantling of vessels. The details of ownership and management of ships are fully transparent and effective liability arrangements would be in place. Existing ships would be made progressively cleaner. Toxic and hazardous substances should be systematically removed and replaced which could occur during maintenance, repair, refitting and rebuilding programs. The result is a next generation of “clean ships.”

Scenario 3: Market Loss

In this scenario, India loses its share of the ship-breaking market, which is picked up by other countries such as Pakistan, Bangladesh. This scenario is possible, but dependent on strategies adopted by the different players. Here, international organizations work in competition with one another: while the ILO works single-handedly to ensure safe working conditions for ship-breakers, the IMO is committed to safe guarding the interest of ship-owners. Meanwhile, the Basel Convention focuses only on halting toxic trade. Ship-owners defend and protect their economic interest. Civil society groups consistently put pressure on the Indian Government to refuse entry of old vessels in Indian waters. Due to strong local public opinion and juridical activism²² the government enforces a ban on ship-breaking. This results in the demise of India's ship-breaking industry, a market shift to Bangladesh, Pakistan and China, and job loss for thousands of people.

Scenario 4: From Bad to Worse

All parties in this scenario compete against each other. International organizations like ILO, IMO, and Basel convention will not cooperate. Ship-owners and other commercial groups like ship-breakers are the drivers of any negotiation process and will be well placed to exploit the loopholes in international regulations and agreements. This isolationist strategy will have a negative environmental impact, leading to continued harm of people due to environmentally unfriendly ship-breaking practices.

CONCLUSION

This case is a classic example of a complex environmental issue, where multiple interests are overlapping and competing multilateral legal regimes provides opportunity for various actors to engage in time consuming negotiations. There are multiple sets of actors, each with conflicting and overlapping interests. Recent developments in the ship-breaking industry have highlighted this conflict through various events in the past couple of years. For example, the scheduled phasing out of single hull oil tankers after 2005 has highlighted ship-breaking and the sensitivities surrounding it because 2000 tankers are up for conversion to scrap in Asian ship-breaking yards, mostly in India. Environmental groups have demonstrated their ability to challenge ship-breaking industry in the *Clemenceau* case; however broader issues are still unresolved. Multilateral negotiations require common and harmonious global legal regimes than currently overlapping legal structures. These regimes

22. See Recent Supreme Court Decisions related to Environment on <http://supremecourtindia.nic.in/environment>

must provide ample space for economic, social, environmental and political factors to interact in a dynamic way thus permitting an active platform for multilateral negotiations.

APPENDIX I

Definitions

Flag State: This is the nation of the flag flown by the vessel. Often a ship is registered in one state (the Flag State) but its owners are headquartered in another. The Flag State is sometimes referred to as the "Administration" in IMO conventions.

Port State: the EU considers the State of export or dispatch to be any State from which the shipment of (hazardous) waste was planned or made. This is the country from which the shipment has begun – i.e., from which 'the physical action of moving' the waste commenced. In most cases the country of export will be the Port State and not the Flag State.

Single Hull Tanker: The IMO's MEPC working group identified three categories of oil tankers:

- Category 1 – oil tankers of 20,000 tons deadweight and above carrying crude oil, fuel oil, heavy diesel oil or lubricating oil as cargo, and of 30,000 tons deadweight and above carrying other oils, which *do not comply* with the requirements for protectively located segregated ballast tanks (commonly known as Pre-MARPOL tankers).
- Category 2 – oil tankers of 20,000 tons deadweight and above carrying crude oil, fuel oil, heavy diesel oil or lubricating oil as cargo, and of 30,000 tons deadweight and above carrying other oils, which *do comply* with the protectively located segregated ballast tank requirements (MARPOL tankers)
- Category 3 – oil tankers of 5,000 tons deadweight and above but still under the tonnage specified for Category 1 and 2 tankers.

Toxic Ship: under the UN Basel Convention, vessels due to be broken are considered toxic waste and should not be exported from OECD countries to non-OECD countries. Greenpeace urges EU institutions to take urgent action on EU controlled single-hull oil tankers, by enforcing the EU Waste Shipment Regulation, to fight the lack of transparency in shipping, and to develop a definitive and consolidated list of single-hull oil tankers subject to phase-out regulations. The organization also demands an immediate commitment from EU transport ministers and the European Commission that the toxic burden of Europe's single-hull oil tankers will not end up on Asian beaches.

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THE ISSUE OF ACCESS TO AIDS TREATMENT: POSSIBLE EVOLUTION OF THE LATENT CONFLICT BETWEEN ABBOTT LABORATORIES & BRAZIL & SOLUTIONS TO OVERCOME THE CRISIS

Laura Marconnet

ABSTRACT

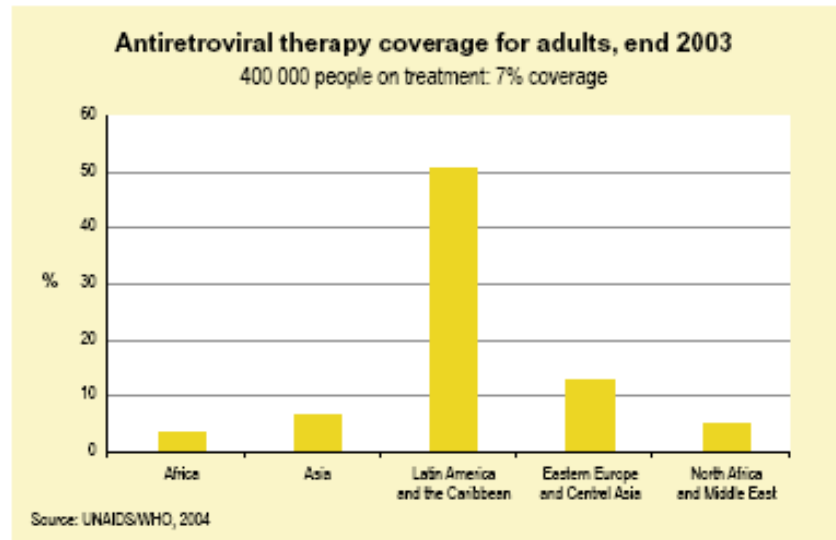
Thanks to anti-retroviral (ARV) drugs, HIV infected people can live their lives, despite carrying the virus in the body. Until recently, ARV treatment trials required constraining precautions and were ill-suited to the living conditions of many patients, particularly those in tropical and very poor regions of the world. In addition, HIV infected people have begun to develop resistance to first line ARV treatment. In 2005, Abbott Laboratories launched a second generation of ARVs offering revolutionary benefits and bringing new hope for patients living in low income and poor countries. Under the pressure of international NGOs such as Médecins sans Frontières (MSF), Abbott consented to sell the new formulation for a reduced price to Sub-Saharan African countries where, as elsewhere, the drug remains extremely costly. Until today, the new drug has still not been delivered to MSF. This new treatment remains inaccessible to a wide range of countries whose development is highly affected by the HIV pandemic. As a result, despite the Trade-Related Intellectual Property Agreement signed by the World Trade Organisation (WTO) members in 1994, Brazil and 19 other Latin American countries are exploring a common strategy of patent breaking for ARV local production, invoking national emergency as prescribed by Article 31 of the agreement. Other countries also concerned by the HIV pandemics, such as India and China, and with the capacity to generically produce the drug, are inevitably involved in this issue. This paper presents two possible scenarios for the evolution of this latent conflict and proposes multiple solutions in order to negotiate the resolution of this potential crisis.

THE CONFLICT SURROUNDING ACCESS TO ANTI-RETROVIRAL TREATMENTS

HIV/AIDS Impact and Treatments

According to 2005 figures published by the United Nations AIDS Program, 40.3 million of people worldwide were HIV-positive, among which 2.3 million were children under 15 years old. The same year, 3.1 million adults and children died from AIDS, of which 2.4 million were in Sub-Saharan Africa.

In poor countries HIV/AIDS is having a huge impact on development. This pandemic represents an economic and social burden for families needing to care for the sick and can generate social exclusion. Furthermore, the disease brakes economic development by weakening the labor force and targeting young adults during the “most productive



period of their life.”¹ The massive medical cost for workers, the relentless absenteeism, and the successive worker-deaths breed huge business costs that inhibit the capacity of various

sectors to sustain previous levels of productivity and services. This means that HIV/AIDS can place a tremendous weight on a country's national budget and revenue.

The Access to Anti-Retroviral Therapy

Antiretroviral (ARV) drugs allow people infected by HIV to fight against infectious disease, and to stay healthy while living with the virus. According to different stages of HIV/AIDS, specific combinations of several (typically three or four) ARV drugs² – known as *Highly Active Anti-Retroviral Therapy (HAART)* – are necessary. Only 400 000 HIV infected people were receiving an antiretroviral (ARV) treatment at the end of 2003. Therefore, nine out of ten adults in urgent need of therapy were not reached.³ Among them, five to six million live in low and middle-income countries.⁴

The access to ARVs has significantly increased over the last few years due to the dramatic drop in price of first generation treatments. Advocacy by various international organizations and NGOs, as well as competition, are responsible for this fall (see Annex 1). In fact, production of generics has led to the price drop and to the practice of differential pricing by pharmaceutical companies. In this way, first generation drugs, which are sold for about US\$ 10 000 per person per year upon market introduction, were available for US\$

¹ *HIV/AIDS and Human Development Thematic Guidance note*, NHDR occasional paper, UNDP, April 2005

² Typically three to four.

³ WHO estimates

⁴ Progress report on the Global Response to HIV/AIDS epidemic, UNAIDS 2003

300 in low-income countries under their generic version. The generic production of first line ARVs started in India and spread to Brazil and South Africa. In order to compete, pharmaceutical companies conceded reducing their prices to developing countries by up to US\$ 500.

Among second generation drugs, only one of them is manufactured generically, in India. While reduced prices have been conceded by pharmaceutical companies to the poorest nations, low and middle-income countries are still facing high prices – up to 12 times the prices in developing countries – and difficult access to ARV drugs.

In 2005, a new version of an existing second line ARV treatment called Kaletra was created by Abbott Laboratories Ltd, a US pharmaceutical company. This protease inhibitor is a formulation of lopinavir/ritonavir (LPV/r) that offers revolutionary benefits thanks to the melt extrusion (Meltrex) technology used for its development. It is a second line treatment efficient for patients after resistance to the first combination of medicines has naturally developed. In addition, the new treatment, requiring fewer pills, does not need to be taken with food or to be refrigerated. Access to this new heat-stable ARV formula is therefore crucial for countries where the initial form is ill-suited to climate and nutritional conditions.

A Rising Conflict Around the Access to Kaletra

This second line treatment has not yet been distributed outside the United States. On 6 April 2006, Abbott Laboratories launched the registration process of the new drug with the South African Medicines Control Council (South Africa's drugs regulatory agency), and decided to make the treatment accessible to African countries for US\$ 500 per year per patient. This is the cost of the older version of Kaletra. However, unlike other companies, Abbott does not offer differential prices in middle-income countries despite the fact that these countries are also home to millions of people living on less than US\$ 2 per day. The price of the original (first generation) Kaletra in middle-income countries outside Africa is on average 7.4 times more expensive than in low-income countries (a mean of \$672 compared to \$4,998). In some developing countries, the price is nearly as high as it was in the US (\$6,944). Moreover, since 2005, and under the TRIP agreement, countries members of the World Trade Organization (WTO) have to respect a 20-year patent period before manufacturing generic drugs. By using a compulsory license, developing countries can decide to produce generics but they can no longer export them, except to least developed countries (see Article 31 of the TRIP agreement Annex 6).

Currently, this new ARV treatment by Abbott Laboratories remains inaccessible to a broad range of countries located in Latin American, Asia and Eastern Europe. Therefore, this drug, today's the best product to fight AIDS and the most suited to conditions in developing countries is limited in accessibility. Brazil, despite the price reduction obtained from Abbott Laboratories, is still threatening the company with intentions to break the patent and locally produce last ARV generation.

ACTORS INVOLVED IN THIS ISSUE

Abbot Laboratories, Ltd.

Abbott Laboratories is the third largest pharmaceutical company in the US, with an annual revenue of US\$ 22.3 billion in 2005. The company has been working on HIV drugs for the last 20 years. During the second half of 2000, Abbott launched the ARV Kaletra in the US.

This drug has become the most prescribed protease inhibitor for HIV/AIDS in both the US and Germany (where the drug is manufactured). In 2005, the global sales of the first line of Kaletra represented around 10.5% of Abbott's total pharmaceutical product sales for the year. During the first quarter of 2006, Kaletra sales grew 18% reaching US\$ 280 million worldwide. This increase is mainly due to the domestic market introduction of the second generation formula. This new formula, based on a Meltrex process, was approved by the US Food and Drug Administration (FDA) in October 2005 and on 28 April 2006 by the scientific committee of the European Medicines Agency (EMA).

Over the past years, Abbott has faced competition by generic drugs produced in India and Brazil, as well as pressure from international organizations, the governments of developing countries, and civil society to lower its prices and make its ARVs more accessible. Having reduced its prices for the poorest countries and conceding lower prices also for Brazil, Abbott Laboratories has maintained the original rates for all other countries.

To its credit, through a special Fund, the company is investing US\$ 100 million in developing countries to find solutions to the underlying barriers behind testing, treatment and support services for people living with HIV/AIDS. Through pioneering programs that prevent mother-to-child transmission of HIV, expanded access to testing and treatment, strengthened health systems, and support for children and families, Abbott has improved the health and lives of millions of people affected by HIV/AIDS.

Abbott remains the leader in the ARV industry and keeps investing in research and development in this area thanks to the high profitability of its drugs. The latest version of Kaletra required costly research and manufacturing which need to be recovered. Therefore, it is in Abbott Laboratories' interests to maintain the ARV prices at their current level in order to make the new drug profitable.

The Generic Drug Producers

India

A new patent law was enacted by the Indian parliament in March 2004, in order to comply with the WTO TRIP agreement granting exclusive commercial rights to patent-holding companies for a minimum of twenty years. This law aims at prohibiting the production of generic medicines without patent. The consequences of this new law concern not only the 5 million Indian people living with AIDS, but also the AIDS patients of the developing countries dependant on Indian generics for HIV treatment. India has been producing generic drugs for the last 30 years and exporting its ARVs to the developing and least developed countries that cannot afford brand-name medicines.

With this new law, India is exhibiting a willingness to follow the WTO rules. By establishing strict domestic patent laws, India sets a favorable environment for foreign direct investment. Even if the flexibility of the TRIP agreement allows the country to use compulsory licenses for public health reasons, it seems unlikely that India would break the patent to produce the second generation Kaletra.

Brazil

In July 2005, the Brazilian government and Abbott Laboratories reached an agreement after tense negotiations regarding Brazil's access to the first generation Kaletra. In the beginning of June, the Brazilian Ministry of Health declared it would use a compulsory license in order to domestically produce a generic form of Kaletra. The 31st article of the Trade-

Related Intellectual Property WTO agreement (TRIP) was used to justify the implementation of a public health safeguard. Abbott reacted strongly by denouncing Brazil's actions as a protectionist maneuver in support of its own pharmaceutical industries by using the flexibility of the TRIPS agreement. The Brazilian government withdrew its intention to break the patent when Abbott accepted to lower the price of Kaletra in exchange for the purchase of a greater number of pills. Brazil also received guaranteed access to the second line treatment for the same price.

The National STD/AIDS Program, launched in 1996 by the Brazilian Ministry of Health, aims to guarantee universal and free access to all resources available for the treatment of the disease, including diagnosis and prevention at public hospitals. To guarantee the use of the latest generation antiretroviral on all people, the Ministry of Health has increased by 50% the resources dedicated to the program, from R\$ 620.9 million in 2004 to R\$945 million in 2005 (an equivalent of approximately US\$ 393.9 million). Of this sum, almost one third (R\$ 257 million) will be used exclusively for the acquisition of Kaletra. According to estimates, by 2008, 215 000 people in Brazil will need the treatment, representing a budget of US\$ 520.8 million. Worldwide, Brazil's program is considered a model for combating HIV/AIDS in developing countries. In 2004, Brazil received an international award from UNAIDS for its leadership in the fight against HIV.

Brazil's position at the international level regarding access to drugs manufactured in developed countries is necessary for maintaining the national health program. Because AIDS treatment requires continuous access to new generations of drugs (due to resistance development), the absence of local production is a burden on the implementation of this national health program. Furthermore, within the international community, Brazil is a leader among developing countries when it comes to international trade issues, and a defender of the terms of trade of the southern economies. Last year, Brazil's economic clout helped push through a landmark agreement between the governments of 11 Latin American countries and 26 drug companies to lower the cost of antiretroviral drugs in the region.

Despite its agreement with Abbott Laboratories, Brazilian government officials have continued to call for universal access to ARVs and for the right to issue compulsory licenses in order to produce generic versions of latest generation ARV treatments.

Other Latin American Countries

Latin American members of the Dominican Republic/Central American Free Trade Agreement (DR-CAFTA) are being compelled to adjust their national legislation on property rights to the provisions included in the CAFTA. For instance, in Guatemala, a new law enacted last year and considered by *Médecins sans Frontières* (MSF) as a "first step in the implementation of DR-CAFTA in Guatemala," will prevent the Department of Regulation and Control of Pharmaceutical Products from granting marketing approval to generic medicines in Guatemala for five to 10 years. This effectively creates a market monopoly to originator drug manufacturers and prevents access to affordable medicines for up to a decade in this country.⁵

China

China started producing HIV/AIDS medicines in 2002 as the number of Chinese infected by the virus grew and the brand drugs price remained unaffordable. Today, the country has

⁵ *Testimony of MSF on IP Provisions in DR-CAFTA & Consequences For Access to Essential Medicines*, MSF, www.doctorswithoutborders.org

the technical capacity necessary to produce the most sophisticated drugs. Thus, according to Suerie Moon who works for the Access to Essential Medicines Programme of Doctors Without Borders in Beijing, "Chinese producers are already making the raw materials for a wide array of second line drugs. There is no Chinese producer that has been WHO qualified, but we know that the raw material production is the most technically demanding part of the process, so we're fairly confident." Moreover, according to experts, there are 1.5 millions people infected with HIV in China. Given the social difficulties the country is experiencing and its fast economic growth, the Chinese government needs to act quickly in order to tackle the public health issue.

At the same time, Chinese officials have declared their desire to respect the WTO agreement on patents and have initiated discussions with pharmaceutical companies that produce second line ARV treatment.

NGOs

Médecins sans Frontières

Médecins sans Frontières (MSF) has been running an international campaign for the access to essential medicines since the 1990's, and plays a very active role with respect to ARV access. Recently this NGO's actions advocating lower price for Kaletra in developing countries have led to Abbott's promise to sell the drug to African countries at the same price as the first line Kaletra, i.e. US\$ 500. Since MSF is a world renowned NGO, its campaign can impact the reputation of pharmaceutical companies such as Abbott. MSF continues its call for access to the new Kaletra not only by African countries but by others as well.

The Clinton Foundation

The Clinton Foundation is a major actor in the issue of access to HIV/AIDS treatment, and Bill Clinton has played an important role in ARV access by poor countries through it. Clinton has gathered a team of experts who have worked with different drug companies in order to study production costs and the price reduction feasibility. This work led to an agreement with suppliers of generic ARVs medications in 2003 that dramatically cut the price of the most commonly used triple drug therapy combinations to less than US\$ 140 per person per year. According to the Foundation, "overall, the agreement reduces the current price of drugs in the developing world by one-third to one-half." However, as the TRIP transition period is ending, exports of generic ARV drugs is no longer possible (except to least developed countries).

Recent Developments

19 Latin Countries Form a Group to Negotiate Access to AIDS Treatment

In January 2006, representatives from 19 Latin American and Caribbean nations gathered for a three-day conference organized in Brasilia to discuss regional AIDS prevention. The conference's final report will be presented at the UN's General Assembly in May 2006. According to declarations to the press made by Pedro Chequer, the head of Brazil's AIDS program, this group of countries seeks to act as a bloc able to "build effective mechanisms to produce medication locally," indicating that simply a price reduction is no longer a

satisfactory response to facilitating access to AIDS treatment. These countries aim to co-invest and exchange information in order to begin producing the drug themselves.

STAKES IN THE CONFLICT

Public Health

India's enactment of a new intellectual property law preventing local firms from producing generic drugs without a patent has given birth to a new high risk surrounding ARV access. In fact, since compulsory licensing remains a difficult process in India, there is very little chance to see the country using this mechanism in the name of public health as permitted in Article 31 of the TRIP. This means that while first line drugs are becoming obsolete, India is unlikely to produce new generic versions of the second line treatment, and to export these drugs to poor countries. This would result in an absence of competition and the stagnation of the price of the new drug at a very high level.

As far the second generation Kaletra is concerned, only African countries and Brazil have been granted a low price. The second line treatment is likely to remain inaccessible to millions of infected persons in Asia, Latin America, and Eastern Europe.

Pharmaceutical Research & Development

According to some experts at the World Health Organization (WHO), the production of generics and the decrease of ARVs' market price have deteriorated the incentive among pharmaceutical companies to undertake R&D for new HIV/AIDS treatments. In fact, the patent erosion resulting from the generics' production by developing countries, as well as compulsory licensing can turn pharmaceutical laboratories away from a poverty-related disease market, characteristic of the antiretroviral industry. Drug companies can "shift their emphasis of research and development to higher profit medicines for affluence-related diseases such as rheumatism."⁶ The figure shown in Annex 4 compares the declining number of patent applications related to HIV/AIDS since the Doha declaration, against those for affluence-related diseases such as rheumatism, which keeps rising. Therefore, as long as these pharmaceutical companies are spearheading R&D on HIV/AIDS the drug therapies are likely to remain at very costly.

The Market in Developed Countries

The position maintained by pharmaceutical companies against the production of generics can also be explained by a fear of seeing these treatments invading the markets of developed countries and competing with brand-name drugs. Some argue that the main reason behind the US resistance to the production of generic drugs actually stems from the risk vis-à-vis the domestic market. Indeed, the issue for the multinationals would not be the poor countries' markets, which are financially small, but the poor-country examples. If companies in India can manufacture and sell medicines for a fraction of the price of those which are sold in the wealth countries' markets, pharmaceutical manufacturers will no longer be able to justify their ARV treatment price in the developed world. Basically, the generics reveal the profit margin made by the pharmaceutical companies on these medicines.

⁶ *Patents and Essential Medicines : an application of the Green Intellectual Property Project*, Itaru Nitta, WHO

The Risk of Compulsory Licensing

In 2005, several middle-income countries showed their willingness to apply patent rules domestically. As a result of the WTO agreements on intellectual property, and in the framework of regional trade agreements such as the CAFTA, some countries have voluntarily tied their hands regarding the production or import of generic drugs through national legislation. India's new patent law can be interpreted as a willingness to patent its own research. While countries can invoke compulsory licensing in the name of national health, it is nevertheless a risky move with respect to their position in international trade. For instance, China, with the potential of being the world's ARV factory, China might also not wish to compromise its recent WTO membership, and instead select actions to reinforce its position as a reliable actor in international trade. In effect, China has chosen to negotiate with pharmaceutical companies about second-line drugs.

POSSIBLE SCENARIOS & CONFLICT RESOLUTIONS

Given the conflicting relations between Brazil and Abbott Laboratories, the recent declaration of Brazilian officials regarding the access to AIDS medication, and the stake of public health as mentioned above, one can expect a clear statement by Brazil on this issue and a build-up of this latent conflict. The situation is likely to evolve in different ways according to who is going to be involved. Therefore, in order to identify solutions to this potential crisis, it is necessary to elaborate different possible scenarios based on the various interests of the stakeholders.

Scenario 1: "Latin Action"

In May 2006, 19 countries from Latin America and the Caribbean submitted a report to the United Nations regarding a common strategy to locally produce AIDS drugs and called for the help of the international community to overcome political and economical barriers in price negotiations. In the report, this group of countries announce their intention to consider side-stepping foreign patent holders and to manufacture ARVs themselves.

The first stage of this strategy targets the access to the new Kaletra. The aim is to provide the HIV infected patients of the 19 countries with the drug by the end of 2006. Brazil has imported the raw material from China and is able to manufacture the drug domestically.

The second stage would consist in redefining the TRIP agreement in order to provide developing countries with sustainable access to ARVs. To this end, they intend to propose changes related to the trade of generics among countries.

Pharmaceutical companies, who produce the drug, together with US officials have reacted immediately and strongly in the press, invoking the WTO agreements.

Actors involved

the 19 countries, Abbott Laboratories, the United Nations, NGOs, Clinton Foundation
Off track: the US government

Solution 1

Compulsory licensing accompanied by a "royalties" or usage-fee system. In order to compensate Abbott's revenue loss, an annual compensation could be collected based on profits made by the manufacturers of generics that mimic Abbott's drugs. In this setting, the

producing nation would be permitted to export the drug to the remaining 18 members of the group of 19.

Solution 2

A price agreement between the group of 19 countries and Abbott Laboratories where ARV treatment price is guaranteed to remain below US\$ 500.00 per year per patient for any drug marketed by Abbott during the next 10 years. In exchange, the group of 19 would refrain from using compulsory licenses during the same time period.

Solution 3

An alternative to the second proposition consists in restricting the agreement to the last version of Kaletra only.

Tactics

A tactic proposed by the United Nations includes appointing Bill Clinton as a special envoy responsible for leading discussions with Abbott Laboratories on the issue of ARV price reduction. Clinton has good relations with the current US President, George W. Bush, and has already dealt with humanitarian issues, particularly those involving US national interest, for example with respect to the US Tsunami response. He can play a key role in identifying an acceptable solution that preserves the US interests while enhancing the access to AIDS medicines for Latin America. Having already dealt with this issue with other laboratories in the world, Bill Clinton is a credible and influent negotiator.

The negotiations must occur as secretly as possible in order to show to the board of Abbott a willingness to not impact on the image of the company.

Scenario 2: "Latin-Asian coalition"

For a long time, Brazil, China and India have been secretly negotiating a common strategy regarding the access to AIDS treatment. At a WTO general council meeting, the three giants jointly declare their capacity to produce a generic version of the last generation of ARVs, but are willing to find an alternative to patent breaking. They ask the countries involved to put their effort in finding a viable and acceptable solution to this problem by the end of 2006, after which China, India and Brazil could otherwise jointly begin the production of the last version of Kaletra. The three countries argue that the urgency of the situation, given the growing number of HIV infected people, requires fast reaction by the parties involved.

Actors involved

Brazil, China, India, the United Nations, WTO members, NGOs
Off track: Abbott Laboratories, the US government

Solution 1

The creation of an international HIV Fund to help developing countries purchase the necessary drugs. A revenue-based tax could be collected by organizations with property rights responsibilities, such as the World Intellectual Property Organisation (WIPO). The monies would supply an international fund to help countries to acquire the medicine from

the appropriate laboratories. According to WHO study, this tax could yield US\$ 50 billion per year.⁷ In addition, a tax collected from the property rights revenue earned by firms in all sectors of innovation could also feed this fund. The countries eligible to access the HIV Fund would be the low and middle-income countries affected by the pandemic.

Solution 2

As in the previous scenario, compulsory licensing accompanied by a system of compensation is proposed. In this case, however, in order to compensate Abbott's revenue loss, an annual tax could be collected on profits made by the manufacturers of generic ARVs that copy Abbott's formulations. In this setting, the country producing the drug would be allowed to export the drug to the members of the group of 19.

Solution 3

The patent duration is reduced to five years and there is no tax on future generic manufacturing. Exports remain possible but only to the least developed countries.

Solution 4

An international agreement fixes the maximum price (a price ceiling) for selling AIDS drugs to countries with a per capita GDP below a predetermined level for a period equivalent to the patent duration.

CONCLUSION

These scenarios must be used in order to anticipate conflicts between not only the actors above-mentioned but also future others, keeping in mind the growing drug production potential of South Asian countries. Domestic political agendas may drive future patent-breaking decisions and lead to necessary multi-stakeholders negotiations. These conflicts can be anticipated now and mitigated in the future if HIV-AIDS and international trade stakes are understood today along with the interests of the various actors involved.

Given the millions of human lives involved and the Millennium Development Declaration and goals, greater international cooperation, integrating public and private actors, is needed to ensure that analysis is followed by acts of conflict prevention and that the effectiveness of the responses to HIV/AIDS in the developing world is enhanced.

UPDATED NOTE ADDED AFTER MAY 2006

The conflict generated by the compulsory licenses issued by the government of Thailand and later on by Brazil, vis-à-vis Abbott Laboratories and Merck Sharp ARV products, is compromising the access of the Thai and Brazilian HIV-positive populations to future generation treatment. This situation could have been avoided had the confrontation been foreseen and stakeholders brought to the negotiation table with the various scenarios and their corresponding solutions.

⁷ *Patents and Essential Medicines : an application of the Green Intellectual Property Project*, Itaru Nitta, WHO

ANNEX 1

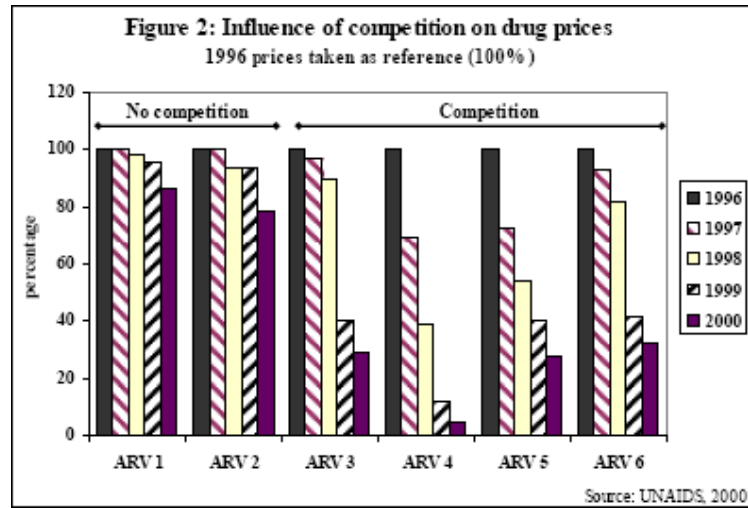
Coverage of ARV therapy in developing countries, December 2002 (adults by region)*

Region	No of people on ART	Estimated need	Coverage
Sub-Saharan Africa	50,000	4,100,000	1%
Asia	43,000	1,000,000	4%
North Africa, Middle East	3,000	9,000	29%
Eastern Europe, Central Asia	7,000	80,000	9%
Latin America, Caribbean	196,000	370,000	53%
Total	300,000	5,500,000	5% av.

ART = Antiretroviral therapy

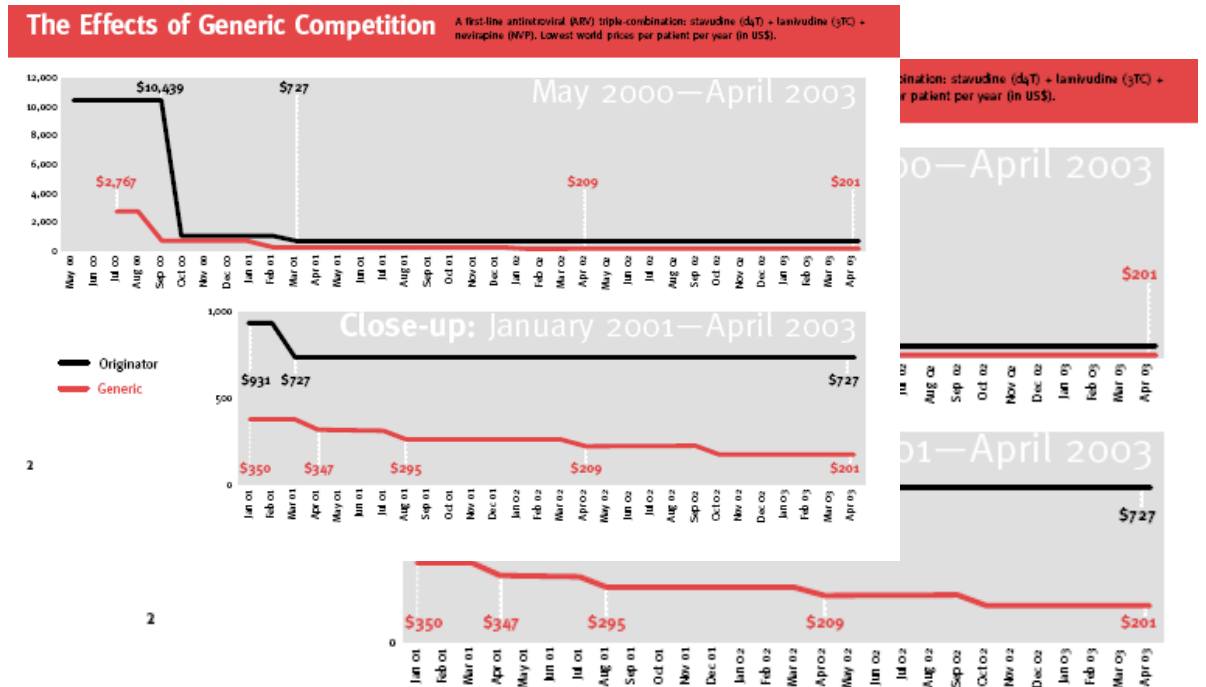
Source: *Surmounting Challenges : Procurement of Antiretroviral Medicines in Low- and Middle-Income Countries - The Experience of Médecins Sans Frontières*, pre-publication draft

ANNEX 2:

ARV prices evolution

Source: UNAIDS, 2000

ANNEX 3:



ANNEX 4:

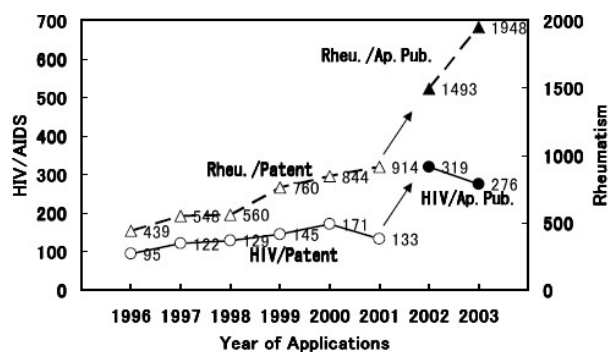
Evolution of the number of patent applications for HIV/AIDS medicines since 2001

Figure 1. A downward trend of the number of patent applications for HIV/AIDS medicines in and toward the US since 2001.

Since the Doha Declaration in 2001, the number of patent applications for HIV/AIDS has been decreasing in contrast to a continued increase in medicines for rheumatic medicines, a typical example of high-profit goods related with affluence-related diseases. The horizontal axis of the figure represents the year when a patent application was filed with the US Patent and Trademark Office (USPTO) by an American or foreign applicant. The left and right vertical axes represent the number of granted patents for HIV/AIDS and rheumatism, respectively when an application was filed in 2001 or earlier. In the middle of the figure, the left solid line (marker: open circle) and left dashed line (marker: open triangle) correspond to HIV/AIDS and rheumatism, respectively. For example, among HIV/AIDS-related applications filed in 2001, 133 patents were issued after examinations in usually two or three years from their application. However, when an application was filed in 2002 or 2003, a major percentage of applications is still under examination and not issued yet. For these later applications, two vertical axes indicate the number of application publications before examination, instead of the number of granted patents. In the figure, the right solid line (marker: filled circle) shows application publications for HIV/AIDS medicines and the right dashed line (marker: filled triangle) shows those for rheumatism medicines. The patent applications filed on or after November 29, 2000 have been disclosed in the form of application publications by the amended US patent law (35 U.S.C. §122(b)). For example, 319 applications for HIV/AIDS medicines were filed in 2002 and they are now available from application publications.

Methodology: These data for HIV/AIDS were obtained by a retrieval formula, (SPEC/((AIDS OR HIV) OR ((acquired AND immunodeficiency) AND syndrome)) OR ((human AND immunodeficiency) AND virus)) AND (retroviruses OR retrovirus)) AND (ICL/A61K031/\$ OR ICL/A61K047/\$) AND APD/year\$, from the USPTO databases. The retrieval formula for rheumatism was (SPEC/((rheumatic OR rheumatism) OR rheumatoid) AND (ICL/A61K031/\$ OR ICL/A61K047/\$) AND APD/year\$).

Source: Patents and Essential Medicines: an application of the Green Intellectual Property Project, Itaru Nitta, WHO

ANNEX 5:

*Trade-Related Intellectual Property agreement (TRIP), Article 31**Article 31**Other Use Without Authorization of the Right Holder*

Where the law of a Member allows for other use⁷ of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

- (a) authorization of such use shall be considered on its individual merits;
- (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;
- (c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;
- (d) such use shall be non-exclusive;
- (e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;
- (f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;
- (g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;
- (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;
- (i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;
- (j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

⁷"Other use" refers to use other than that allowed under Article 30.

- (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;
- (l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:
 - (i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;
 - (ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and
 - (iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

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ARGENTINA, ARUGUAY & THE CASE OF *LAS PAPELERAS*: NO LONGER A SIMPLE NEIGHBORLY DISPUTE

M. Varinia Michalun

ABSTRACT

The conflict between Argentina and Uruguay over the construction of two paper pulp mills on the banks of the Uruguay River and their environmental impact is an excellent example of the complexity characterizing contemporary disputes. What should have remained within bi-national conflict resolution mechanisms ballooned into a case rooted in nationalism presented to the International Court of Justice (ICJ) in The Hague.

This chapter explores conflict escalation, how accords with built-in dispute resolution mechanisms are not fail-proof, the souring of relations between parties including the role of third party stakeholders, and the negative consequences of position entrenchment. It illustrates how conflict can be presented in multiple ways – a bi-national diplomatic conflict, an environmental disagreement, a free-trade fracas – and the impact this has on resolution options. Ultimately, via the evaluation of possible resolution options, it aims to demonstrate the potential economic, political and regulatory significance of a dispute and its solution. This is particularly significant as the outcome of this South American conflict could lead to a radical shift in how developing nations manage their environmental policy vis-à-vis MNCs.

PREFACE

This conflict is an ever-growing web of changes, actors, positions and stances. This, together with the fact that on 28 April, 2006 both the President of Argentina, Nestor Kirchner and his Uruguayan counterpart Tabaré Vázquez signaled to the press that there was no room for further negotiation, and that on 4 May, 2006 Argentina submitted its complaint before the International Court of Justice, resulted in a decision by the author to limit most information gathering to that which could be obtained by 30 April, 2006. At the final writing of this document, additional news generated between 7 and 10 May 2006 was incorporated.

INTRODUCTION

The escalating conflict between Argentina and Uruguay over the construction of two paper pulp mills on the banks of the Uruguay River and their environmental impact is an excellent example of the complexity characterizing contemporary disputes. What should have remained within the bi-national conflict resolution mechanisms established in a bi-lateral waterway agreement has ballooned into a case rooted in nationalism currently before the International Court of Justice (ICJ) in The Hague, and potentially threatens the already fragile Mercosur regional trade agreement.

One sees the aims, interests, and tactics of governments, corporations, third party stakeholders, as well as the pressure applied by international and local interest groups

(NGOs). Alliances have formed, promises have been broken, negotiations started and stopped. There are enormous present and future economic ramifications at stake. What is curious about this case is that there is fundamental agreement on key matters between primary parties, which then leads one to question what are the obstacles to resolution, and the motives for third party stakeholders to jeopardize a negotiated settlement. Depending on moves and outcomes, this case could result in: a disintegration of Mercosur, economic troubles for Argentina and/or Uruguay, regional “black-listing” for foreign direct investment (FDI), or a “race to the top” for environmental standards that could revolutionise industry in the Southern Cone and potentially throughout the developing world.

In order to fully appreciate the case of the *Papeieras*,¹ a situation analysis is essential. From here, it is easier to evaluate options, tease out scenarios and finally identify possible solutions with their implications.

SITUATION ANALYSIS

Due to the intricacy of this case, particularly in light of the fact that parties have twice attempted to arrive at a negotiated solution, a historical outline explaining why the conflict arose and why it grew exponentially is essential. From there one can better evaluate the aims and concerns of key actors, appreciate the stakes and assess the issues at play. One might conclude that there is nothing left to talk about, that this issue is beyond a negotiated settlement, and it is truly up to the ICJ to decide. One might also identify ways to remind parties of mutual interests, needs and dependencies, not to mention the cost and damage of a protracted arbitration in The Hague, motivating them back to the negotiating table in order to end this conflict.

BACKGROUND

Geography:

The Uruguay River forms a natural border between Uruguay and Argentina, and has numerous tributaries and smaller rivers joining it (see *Figure 1*).

The pulp mills in question are approved to be built 10 kilometers apart, just outside the town of Fray Bentos. They would enjoy easy access to bridges linking countries, international highways and railway systems that facilitate inter-Latin American transportation. On the Uruguayan side, the area is economically underprivileged, and would benefit significantly from an industrial plant. On the Argentinean side, the Entre Ríos provincial city of Gualeguaychú lies 25km up a large tributary of the Uruguay river, and directly across from the pulp mill sites. Entre Ríos is very agriculturally wealthy, a holiday destination, and an area of many “second-home” real estate investments.

¹ *Papeieras* is the Spanish familiar term for paper mills and it is how this conflict is often referred to in the Spanish-speaking press.

Legal Agreements:

Given the Uruguay River's role as a natural border, in 1975 Argentina and Uruguay signed the *Trato del Río Uruguay* (Uruguay River Accord) establishing methods of cooperation for the waterway's administration, maintenance and environmental protection. In 1976 CARU (*Comisión Administradora del Río Uruguay*: Uruguay River Management Commission) was founded to implement the 1975 agreement and to manage the river, including infrastructure maintenance, the conservation of fishing resources, and any environmental concerns that might arise.² The *Trato* incorporates a notification and cooperation framework whereby if one country plans to undertake work(s) that can affect river navigation, water flows or water quality, CARU must be notified and, if requested, dialogue is established between the Uruguayan CARU representatives and their Argentinean counterparts. In general, this notification process has been a formality and there has been agreement by the parties on what the other wishes to implement. Wisely, however, the *Trato* has a dispute resolution mechanism as well: if for any reason one national party within CARU does not agree, then the governments must find a solution through direct negotiation within 180 days. If after this period the disagreement persists, they may take the matter to the ICJ for arbitration.³

Las Papeleras:

The building of pulp mills in Uruguay is the culmination of a long-term industrial development strategy characteristic of the Southern Cone. Since the 1980s Argentina, Brazil, Chile, and Uruguay have implemented forestry development policies as a means to increase production of exportable goods, i.e., wood and paper. All four countries have significant areas of managed forests and already existing paper mills (*see Table 1*).

In the early 1990's ENCE (*Empresa Nacional de Celulosa de España*) established itself in Uruguay through a subsidiary to focus on forest development. In 2003, it began operating a company-built port on the Uruguay River and is scheduled to open one of the two pulp mills outside of Fray Bentos in 2008.⁴

The well-respected Finnish paper manufacturer Oy Metsä-Botnia Ab (Botnia) signed an agreement with Uruguay in approximately 2002 immediately sparking protests among Uruguayan environmentalists. The Botnia mill represents the largest industrial investment in Uruguay's history, is the largest industrial private sector investment overseas by a Finnish company,⁵ and may very well be the largest *papelera* in the Americas.⁶ It is a US\$1.2 billion (compared to US\$600 million of ENCE) investment, promises 300 plant jobs and estimates employment stimulation of approximately 8,000 total jobs (5,000 direct and 3,000 indirect).⁷

² Malamud, Carlos. *Pulp Mills Divide the River Plate*. Real Instituto Elcano 4 April, 2006 p.2

³ *ibid* p. 2

⁴ *ibid* p. 3

⁵ web page: Uruguay Project www.botnia.com

⁶ Pérez Esquivel, Adolfo. "Argentina-Uruguay: conflicto por las papeleras." *Inter-press Service News Agency (IPS) Alterinfos: Information on Latin America*. Tuesday, 28 February 2006. www.ipsnews.org

⁷ web page: Uruguay Project www.botnia.com.

Combined, these mills represent approximately US\$1.8 billion in fdi, will create 12,000 jobs (direct and indirect), and are estimated to result in a 1.8% increase in Uruguayan GDP.⁸

The Environmental Debate:

Both mills will rely strictly on eucalyptus, hence requiring mono-cultivation of fast growth trees which can, in the long run, be harmful to soil, water, and bio-diversity. This is a primary concern for Uruguayan environmentalists but a secondary concern for the Argentinean residents of Gualaguaychú who worry more about the processing technology to be employed. ENCE and Botnia intend to treat the paper pulp with an Elemental Chlorine-Free bleaching process (ECF) developed in the past ten years. This system is more environmentally friendly and less toxic than the traditional bleaching method with elemental chlorine gas that produces such toxic compounds as dioxins and furans.⁹ However, it is not the most advanced or cleanest technology available. This honor is reserved for Totally Chlorine Free (TCF) bleaching. Botnia and Uruguay maintain that the plants are non-polluting and are being built in compliance European Union environmental standards.¹⁰

Environmentally, the Argentineans worry about air and water pollution, acid rain, the depletion of fish and wildlife, and unforeseen impacts on health. An annual combined production of 1.5 million tons of wood pulp is estimated, and because this is the largest endeavor of its kind to date, the long-term environmental and health consequences are difficult to measure strictly based on qualitative and quantitative experience. Economically, the residents of Gualaguaychú are concerned about property values, the economic losses from any potential drop in tourism, and the adverse environmental impact on agricultural production.

The Blockades:

Beginning in late 2005, the *Asamblea Ciudadana Ambiental* (aka *ambientalistas*) – a grass roots organization of Entre Río residents, primarily from Gualaguaychú, entirely consensus driven, horizontal in structure, and numbering up to 4,000 individual members¹¹ – began to physically blockade the road leading to the Puente Internacional Libertador General San Martín, the bridge linking Gualaguaychú, Argentina and Fray Bentos, Uruguay. This effort is mirrored by a similar one undertaken by the citizens of *Colón*, an Argentinean town further north on the Uruguay River (*not on map*).

Given the timing of this action, which escalated between December 2005 and March 2006 (the summer holiday season), Uruguay estimated a 50% drop in tourism and hence a significant loss in tourist generated income.¹² In addition, international

⁸ Malamud, Carlos p4. Note however that the real revenue gains may not be so large once tax breaks and subsidies provided by the Uruguayan government are taken into consideration.

⁹ Cariboni, Diana. "Uruguay-Argentina: Quiet diplomatic talks on pulp mills hit new hurdle" *Inter-press Service News Agency (IPS)* 30 March, 2006. www.ipsnews.org

¹⁰ *Yahoo! España* "Papeleras – Uruguay quiere solución en Mercosur pero Argentina prefiere La Haya." *Yahoo! Noticias – Internacional* 11 de abril de 2006

¹¹ Valente, Marcela. "Argentina-Uruguay: Un paso hacia la distensión en el conflicto por las papeleras." *Inter-press Service News Agency (IPS) Alterinfos – Information on Latin America*. Thursday, 23 March 2006 www.ipsenespanol.net/nota.asp?idnews=36935

¹² www.clarin.com.ar 16 April, 2006

transportation has been hindered. Chilean transport companies who would normally enter and leave Uruguay by land over the San Martín bridge are now being forced to transport by sea. Uruguayan officials are estimating a current loss of almost US\$340 million in trade due to these blockades.¹³

Negotiations to Date:

According to Argentina, as early as 2003 Uruguay violated the terms of the *Trato* by authorizing ENCE's plant construction without CARU consultation, and refusing to cooperate when Argentina called a special CARU session requesting the appropriate information and consultation practices. Argentina was concerned about the lack of environmental impact information and the fact that ENCE had been given a green light prior to consultation as established in the bi-lateral agreement. It is speculated that Uruguay's silence in this period stemmed from fear that any consultations or environmental demands could result in losing the investment.¹⁴ It was at this time that Argentina learned Uruguay possessed information regarding development plans on the Uruguay River as early as 2002.¹⁵

In 2004, under the terms of the *Trato* the two countries tried to resolve their differences through a negotiated settlement, and the case history notes that both foreign ministers came to an "agreement in principle" that March. Here is where accounts diverge. According to the Uruguayans, an agreement was reached and they cite an Argentinean national annual report as evidence. The Argentineans maintain that the agreement was not ratified and hence invalid, the passage in the report is erroneous, and Uruguay remains in violation of the *Trato*.¹⁶

Still searching for a negotiated solution rather than going to the ICJ as permitted by the *Trato*, in June 2005 Kirchner and a recently elected Vázquez, together with their chief ministers, established the bi-lateral GTAN (*Grupo Técnico de Alto Nivel*: High Level Technical Group) mandated to come to an agreement by 30 January 2006. The GTAN was comprised of national government representatives and experts from both countries. The Argentinean side also included a delegate from the Entre Ríos government and Gualeguaychú's *Ambientalistas*. While the government representatives seemed willing to collaborate and arrive at a resolution, the Entre Ríos delegations were not of a cooperative mindset.¹⁷ After a dozen meetings, the GTAN disbanded with no resolution to the conflict.

Taking matters into their own hands at the Chilean inaugural in early March, 2006 Kirchner and Vázquez agreed to clear the way for an independent environmental impact study and set a meeting at the end of the month in Uruguay to discuss the details. The terms required for undertaking such a study were 1) Argentina would put an end to the border blockade set up by the *ambientalistas* and 2) Uruguay would persuade both multinationals (MNCs) to halt construction for a 90-day period while the studies were completed. By late March, both parties had managed to sway their respective third party

¹³ www.terra.com.ar/canales/politica/136/136273.html "Papeleras: Uruguay presentó su reclamo en La Haya. 10 April, 2006

¹⁴ Malamud, Carlos p4.

¹⁵ *ibid* p4.

¹⁶ *ibid* p. 7 & Cariboni, Diana. (Garza, Manuela). "Uruguay-Argentina: Pulp frictions threaten integration" Inter-press Service News Agency (IPS) *Alterinfos: Information on Latin America*. Friday, 27 January 2006. www.ipsnews.org/news.asp?idnews=31808

¹⁷ Malamud, Carlos p3

stakeholders and these requisites. The *ambientalistas* lifted the blockades and both ENCE and Botnia agreed to suspend construction as of 6 April for 90 days, with no prejudice to worker pay. The 29 March meeting aimed at establishing a technical investigative commission for studying the environmental impact of the plant was postponed.¹⁸ There is no indication that an agreement would not have been reached. However, the parties were having difficulty agreeing on details prior to their final meeting.¹⁹

Here is where third-party stakeholder involvement became overtly direct and sent the possibility of a negotiated solution into a downward spiral. First, in order to avoid a crisis in Entre Ríos, Kirchner caved in to the demands of the *ambientalistas* and the provincial governor, a key player in precipitating the environmental concerns of his constituents. Among these demands were: the criteria for the environmental impact study (bi-lateral, independent with Argentinean and Uruguayan University experts, etc²⁰); a financial safety-net that would compensate future damages linked to pollution caused by the mills; that the results of an independent environmental impact study be legally binding.²¹ Vázquez made it clear that these terms would not be accepted, although he did not close the door to negotiations. His realm of options became limited, however, given that his agreement with Kirchner to even discuss an environmental impact study was taken unilaterally – i.e., without consulting other members of his government or coalition.

The second damaging move was made by Botnia. On 5 April, the day before construction's 90-day stop was to commence, Botnia announced the suspension would extend only for 10 days, stating that a longer delay would cause too much turbulence on the international financial markets and cause stock values to fall.²² ENCE to date maintains the 90-day agreement. While Vázquez has been criticized as weak before Botnia, fundamentally both leaders have gone too far down the road supporting conflicting third-party interests to be able to turn back and come to terms with each other.

Between early and late April, the two presidents have drifted further apart, digging their heels and ending up in a non-cooperative, non-collaborative position which threatens the relationship between the countries and may have repercussions on Mercosur. In the wings, their chiefs of staff and foreign ministers continued search for a resolution until 28 April when both parties announced in separate statements that a negotiated settlement was out of reach.²³ In early April, Uruguay initially looked to Organisation of American States (OAS) for mediation, who responded saying that it would only serve as such if requested to by *both* parties.²⁴ Subsequently, Vázquez has sent Uruguay's case to Mercosur under its dispute resolution mechanism, the Olivos Protocol, given his positioning of this as an anti-

¹⁸ Yahoo! Argentina "Argentina/Uruguay: Los vecinos celebran que se retrase el encuentro presidencial por la crisis de las papeleras." Yahoo! Noticias – Internacional: Argentina Wednesday, 29 March, 2006

¹⁹ Dinatale, Martín. "Lo técnico superó a la política" *La Nación* 30 March, 2006.

www.lanacion.com.ar

²⁰ Valente, Marcela. "Argentina-Uruguay: Un paso hacia la distensión en el conflicto por las papeleras."

²¹ Dinatale, Martín.

²² Braslavsky, Guido. "Papeleras: Otra vez se postergó la cumbre entre Kirchner y Vázquez" *Clarín* 5 April, 2006 www.clarin.com.ar

²³ www.lanacion.com.ar "Taiana: No veo qué más podemos hacer." 28 April, 2006 & www.plusar.com "Uruguay dio por finalizadas las negociaciones con Argentina." 28 April, 2006

²⁴ Malamud, Carlos p. 7

free trade case.²⁵ Argentina maintains that this is strictly a bi-lateral diplomatic issue and brought its case to The Hague on 4 May 2006.

ACTOR AIMS, POSITIONS & CONSTRAINTS

First, it is critical to note that Argentina has never called for a halt to mill construction, nor did Uruguay initially oppose additional environmental impact studies.

Argentina:

Argentina seeks a thorough independent environmental impact study and has demanded that the projects submit to environmental obligations as stipulated by the World Bank.²⁶ The World Bank has received the MNCs environmental impact studies as part of the loan criteria, and in late 2005 also sent a Canadian-led expert team on site. This team recommended additional studies to determine environmental impact as well as some environmentally friendly technical modifications.²⁷ It is only in May 2006 that the companies are presenting plans for such studies. Their independent nature remains to be established.

The Kirchner government does not openly acknowledge the economic element of this situation, maintaining that it is a bi-lateral diplomatic dispute with environmental issues at its core. However, the signals sent are mixed. On one hand, the government's efforts to contain the *ambientalistas* are weak, rewarded by the group deciding to halt the blockades as of 1 May in order not to damage chances at The Hague (where the argument is more environmental and diplomatic than economic). On the other, Kirchner has been careful to never openly defend their "No to the *Papelelas*" slogan,²⁸ indicating that the trade barrier arguments made by Uruguay are not falling on deaf ears.

Uruguay:

Uruguay asserts its compliance with the *Trato del Río Uruguay* and wants to secure the US\$1.8 billion in foreign investment (equivalent to approximately 10% of its GDP²⁹) together with the jobs and economic stimulus. Until the World Bank loan to the MNCs is approved and the construction complete the project security is only partial.

It is acting under a very strict constraint in the fdi contract with Botnia which stipulates "...that companies whose investments 'suffer losses as a result of war or other armed conflicts, a national state of emergency, revolt, insurrection or demonstrations' will have the right to 'restitution, indemnization, compensation or other arrangements' under the most favorable terms and conditions possible."³⁰ Uruguay is in no financial position to pay

²⁵ "Argentina, Uruguay at Loggerheads over Pulp Mills on Shared River." *Environment News Service*. 10 May, 2006.

²⁶ Yebra, Martín Rodríguez. "El plan: asustar al prestamista" *La Nación* 29 April, 2006 www.lanacion.com.ar

²⁷ Carbone, Florencia. "Reclaman mejoras técnicas a las papelelas" *La Nación*. 10 May 2006

²⁸ Yebra, Martín Rodríguez. "Apareció el mediador más poderoso" *La Nación* 10 May, 2006 www.lanacion.com.ar

²⁹ Malamud, Carlos p. 1

³⁰ Cariboni, Diana. "Uruguay-Argentina: Pulp frictions threaten integration"

restitution to European MNCs because of project failure due to an Argentinean activist movement.³¹

In order to execute its industrial policy goals in the forestry domain it must also remain attractive as an investment partner. At the moment this does not appear in jeopardy as a third paper mill – a Swedish-Finnish corporation, Stora Enso – is indicating a desire to invest US\$1.25 billion, albeit in another province.³²

Fundamentally, this is a political and economic dispute for the Uruguayans, not an environmental one.

Las Papeleras

Both ENCE and Botnia intend to protect their investment interests. They maintain the plants will not pollute and that they are using EU approved environmental standards for plant construction and waste management. The ENCE paper mill, while large, is less significant (half the size) than Botnia's.

One could speculate that Botnia retracted its 90-day construction suspension agreement as a tactic to pressure a resolution between Vázquez and Kirchner. If this is the case, then it backfired. Or, it could be said that Botnia, seeing that no negotiated settlement would be possible decided not to assume the losses that a 90-day construction hiatus could represent. (There is evidence that Kirchner offered to have the Argentinean government pay worker salaries for this 90-day period, and possibly also pay for the environmental impact studies.) Finally, there is the possibility that Botnia made an 11th hour assessment that the results of an independent environmental impact study would not be in its favor and the investment would be in jeopardy. Botnia's motive behind its decision and the official press statement regarding international financial markets remains unclear.

The Ambientalistas:

They are peaceful protestors, never cross the border, and have consistently stated that their aim is not to damage their relationship with their "Uruguayan brothers." However, they do aim to stop the *papelera* construction. They gather every evening (on Fridays and Saturday as many as 500 or 600 people) to discuss options and concrete solutions to the problem of the *papeleras*.³³

While admirable, they are a bundle of contradictions. At times cooperative, evidenced by their (ultimately temporary) lifting of the road-block in March in order to demonstrate good will towards negotiation efforts with Uruguay, they can also be perceived as obstinate, demanding terms to which the Uruguayans clearly will never agree. This leaves little "wiggle room" for negotiators, given that if the *ambientalistas* are taken into consideration, their demands send discussions outside the ZOPA. The Kirchner government has treated their demands many times as key drivers, serving to enhance their power.

³¹ The *ambientalistas* are the blocking demonstrators in this case, leading to a break-down in bilateral talks with Kirchner, sending the project to the Hague, and risking a hold on construction until the ICJ hands down a decision.

³² Carbone, Florencia. "Otra industria papelera se instala en Uruguay" *La Nación*. 29 April 2006

³³ Lavaca. "Argentina-Uruguay: Mobilizaciones en Gualaquaychú contra la construcción de las papeleras, una mirada desde los piquetes y las asambleas." Inter-press Service News Agency (IPS) *Alterinfos: Information on Latin America*. Monday, 6 March 2006. www.ipsnews.org

Uruguayan Civil Society:

While Uruguayan environmentalists oppose the mono-culture of eucalyptus plantations, and press for government enforcement of water-use and other environmental standards they do not seek to curtail building of the mills. They do however, believe solutions can be found that do not violate the Finnish-Uruguayan investment agreement.³⁴

According to a late 2005 survey, it appears that 62% of Uruguay's population is in favor of the mills versus 11% against them. In the directly affected region 69% expressed a favorable opinion (74% in Fray Bentos) contrasted to 19% against the mills. At that time, almost 50% of people surveyed indicated a belief "...that the issue was one of competition for foreign investment."³⁵

When considering the positions of these various actors, it is clear that the governments can and do have long-term aligned interests. They have been co-opted by third parties who wield a considerable level of power. Unfortunately, the interests of these third parties do not align with each other, causing friction and preventing a negotiated resolution.

ISSUES AT PLAY

At first glance, the issues and stakes of this conflict appear reasonably straightforward: it is a bi-lateral, environmental conflict and what is at stake is a foreign manufacturing plant or two. If only it were so simple!

Issues: Bi-lateral Political Conflict

The issues in this conflict are nuanced, depending on which side of the Uruguay River one stands on. Broadly speaking there is the question of whether or not the *Trato* was violated by Uruguay and if an agreement between both parties was reached during the 2004 bi-lateral discussions. This is the micro, bi-lateral, political issue. Approaching the ICJ for arbitration is an authorized recourse to resolution for this problem.

What becomes problematic is Argentina's request for provisional measures (i.e., that mill construction be suspended until the ICJ hands down its decision). These requests are not often granted which then means that mill construction can continue while the ICJ deliberates. The deliberation process could take years. If the provisional measures are granted then the investments Uruguay is striving to protect are jeopardized. If the provisional measures are denied then the mills can proceed. They may even be complete and operational before a decision is reached, at which point the case was potentially for naught, depending on the ruling.

Issues: Environmental Concerns

It is hard to imagine that two pulp mill plants, 10km apart, generating an annual total of 1.5 million tons³⁶ of paper pulp when functioning at full capacity, will not pollute. The European companies have realistically stated that there will be some pollution, but it will be minimal, and they are willing to establish pollution control mechanisms to limit environmental damage, as well as to prevent irreversible harm.³⁷ These could potentially

³⁴ Cariboni, Diana. "Uruguay-Argentina: Pulp frictions threaten integration"

³⁵ Malamud, Carlos p. 6

³⁶ Malamud, Carlos p. 4

³⁷ Malamud, Carlos p. 2

be monitored by Uruguay, or ideally by CARU, as it is a bi-lateral body entrusted with the management and preservation of the waterway. Unfortunately, CARU's credibility may need reinforcement in light of its history in this conflict.

Embedded here is also an environmental economics argument: direct versus indirect costs and benefits. Uruguay stands to gain financially, enjoying both direct and indirect benefits to the direct and indirect (i.e. environmental) costs associated with this investment. Argentina on the other hand gains little to no direct benefit (jobs are not being created for the Argentines, there is no direct positive GDP impact), but risks sustaining a significant amount of the indirect costs due to environmental concerns: reduced property values, lower tourism income, unforeseen long-term health problems, etc.³⁸

Issues: Economics & Trade

As already explored, one key issue for Uruguay has been economic loss due to the *ambientalista* blockades: an estimated 50% loss in tourist income for the 2005/2006 summer season, and UD\$340 million in lost trade income to date. Therefore, for Uruguay there is a free trade concern, and hence invoking the terms of Mercosur is logical. Beyond this however, the Uruguayan economy can only gain from the ENCE and Botnia investments, and these *papeleras* are part of a long-term industrial and development policy that is now beginning to bear fruit.

Argentina's economic concerns differ, stemming from the environmental economic arguments made earlier. Current trade losses do not fall into its stated position, though there are trade and industrial policy interests, which will be explored.

Issues: Political Constraints

One can introduce a sovereignty argument for both parties. In the case of Argentina, should the government permit its citizens and territory to be damaged by the actions and decisions of a neighboring country³⁹ – especially if there are mechanisms in place to ensure that this does not happen (CARU and the *Trato del Río Uruguay*). Is this not an infringement on national sovereignty? In the case of Uruguay, should one nation's economic and industrial policy be impacted by the demands of a neighbor, especially when it appears that this neighbor initially agreed with the issue at hand? This is an important issue and plays into the conflict at hand, however its full treatment is outside the scope of this document.

Both leaders have inherited the *papelera* problem from past administrations and currently nationalist sentiments are running very high. Politically, neither government wants to appear weak before its constituents or third party interests and the conflict is such that neither is comfortable changing course now. This may be especially true for the Vázquez government given that during his campaign Vázquez and his party opposed the government's agreement with *papeleras*. Very early in his presidency he changed his mind, stating that he became better informed as to the true environmental analysis, and determined that the mills, in their location, were in Uruguay's best interest.⁴⁰ Because his is a coalition government, and Vázquez has been unsuccessful in his attempt to make decisions without coalition approval or consensus with respect to the *papeleras* (his

³⁸ Mastrantonio, Guido "Las Papeleras y el Conflicto Argentina-Uruguay: cómo no resolver un problema, escondiendo las preguntas." *Rebelion: Argentina: El Reino del Revés – Opinión*.

³⁹ Mastrantonio, Guido

⁴⁰ Carbone, Florencia. "Dejamos de ser una provincia Argentina" *La Nación*. 30 April 2006 www.lanacion.com.ar

meeting with Kirchner resulting in the aborted late March summit is a case in point), his decision-making ability is constrained.

Kirchner has walked a long road with the *ambientalistas* and the Entre Ríos governor, supporting them, not calling for an end to the blockades until necessary – when they became a bargaining tool – and not opposing their recommencement after the talks with Uruguay in March were postpone. He cannot suddenly abandon them. However, he cannot fully accept their demands without possibly damaging relations with other provinces as Argentina's existing paper mills enjoy general local support *and* without appearing hypocritical over environmental questions since those mills are known to be more polluting than the two proposed *papeleras* in Uruguay.

STAKES

Together with the various issues at play, there are also significant macro level economic, political and regulatory cards on the table.

Mercosur

Analysts of this conflict cannot but help call into question Mercosur and note that this conflict may serve only to make it more fragile. Uruguay is playing the Mercosur card in a rather intriguing fashion. First, it threatens to bring Argentina before Mercosur for anti-free trade practices, in violation of the agreement.⁴¹ At the same time it has indicated that Mercosur membership is of little economic benefit – it is a regional alliance dominated by Brazil and Argentina who have not fully supported the development of smaller members, and that ultimately Uruguay is better off without the trading block. Hence, in April, 2006 Vázquez traveled to both Mexico and the US apparently seeking new trading partners, and is rumored to be discussing Free Trade Agreements (FTA) outside the Mercosur block. Depending on the FTA details, this could be a violation of Mercosur terms, and an indication to analysts that Uruguay may plan to abandon the regional trade alliance.⁴² Therefore, using Mercosur as an argument against Argentina when Uruguay appears disdainful of the institution *and* may be seeking to separate or distance itself seems rather inconsistent. The most reasonable conclusion is that they will use all the tools at their disposal to “win” this conflict even if it means turning to something for which their respect is dwindling. They are unlikely to go so far as to separate. Given their geographic position, bordering both Argentina and Brazil, maintaining free trade zones may be critical to long term industrial and economic policy. One cannot ignore that Uruguay's Mercosur membership is a likely plus on the balance sheet for fdi seeking access to the Argentinean and Brazilian markets.

Argentina tends to make this anti-free trade argument a non-issue by returning to the fact that the problem is bi-lateral political stemming from the *Trato*.

⁴¹ Cariboni, Diana. “Uruguay-Argentina: Pulp frictions threaten integration” & *Yahoo! España* “Papeleras – Uruguay quiere solución en Mercosur pero Argentina prefiere La Haya.” *Yahoo! Noticias – International* 11 April 2006

⁴² Cariboni, Diana. “Uruguay-Argentina: Pulp frictions threaten integration”

Long-term foreign direct investment

One of the most concerning stakes is long-term foreign direct investment (FDI) for both countries. Both Argentina and Uruguay depend on FDI, especially now and especially in relation to their forestry policy. If Argentina appears to cave in to third party demands the government risks weakening an already shaky position vis-à-vis foreign investors who could worry that interest groups threatening their investment possibilities will be fully supported by the government. Needless to say, Argentina's status as a medium-to-high risk investment site increases with this unresolved conflict.

Currently, Uruguay is a foreign investor's dream and will remain so for as long as it keeps its position vis-à-vis Argentina. As a Storna-Enso executive stated when asked if his company has had any contact with Argentina: "None. We feel as if we were Uruguayan."⁴³ If however, this conflict is not resolved in such a way that the *papelera* project remains up-and-running Uruguay faces the possible European abandonment of the Fray Bentos project and the same long-term FDI risks as Argentina.

For both countries, FDI and joint-venture FDI is the pay-off for a long term industrial and economic development policy being pursued throughout the Southern Cone: forestry, wood and paper production for export. The greater the risk to FDI, the lower the return on this national development strategy, which itself represents a significant investment (funded both domestically and with foreign capital).

Ultimately, for FDI and economic reasons it is in the interest of *both* nations to find a constructive resolution to this conflict, involving as few outside parties as possible. Leaving the decision to an ICJ ruling exposes both to risk.

Regulatory Policy

Most interesting is the implication of this dispute for Argentinean regulatory and environmental standards. If Kirchner's government succeeds and the *papeleras* are forced to further upgrade the bleaching methods and anti-pollution technologies employed, it may result in Uruguay having some of the highest (i.e., cleanest) environmental regulatory standards, possibly starting a "race to the top" in a region that is not traditionally known for its environmental awareness. This could have repercussions across the Southern Cone.

At a minimum it might force existing paper mills in Argentina to upgrade technology (ideally for the environmental groups to the least polluting method). It could also require future mills to use the same methods, both in Uruguay and Argentina, and perhaps even in Brazil and Chile. It may also lead to other environmental activity and regulation throughout the region, requiring investors in multiple industries use the cleanest technology available from the outset.

If, however, the *ambientalistas* succeed and the *papeleras* are forced to quit the project not only would there be a significant negative economic and fdi impact, but it could further promote regional inequality. If only one or two countries improve their standards, and neighbors do not, companies will generally invest in lower-cost, less regulated areas. In the case of forestry Argentina, Brazil, Chile and Uruguay offer the best growth conditions, have an established policy, are the dominant Latin American players, and are seeking the

⁴³ Carbone, Florencia. The quote in Spanish is as follows: "Han tenido algún contacto con la Argentina? Como imaginan que sera su relación?" "Ninguno. [Sonríe nuevamente.] Nos sentimos como si fuéramos uruguayos."

fdi. If all of them begin to tighten their environmental standards, then everyone stands to gain. This may be idealistic, but not impossible.

SITUATION CONCLUSIONS

This is multi-dimensional dispute with strong third party activity and interests. It could be treated as a bi-lateral disagreement, and probably can only be resolved through the lens of integrative rather than distributive bargaining given the number of issues, the ongoing relationship of the actors and that the future will hold more *Trato*-based cooperative efforts.

In principle there is alignment in the interests of key players – neither government wants the European *papeleras* “to go home.” Unfortunately, the balance of power seems to be resting with the MNCs vis-à-vis Uruguay and the *ambientalistas* vis-à-vis Argentina, placing significant constraints on diplomatic negotiating capacity.

Argentina, with its need to satisfy a constituency, appears reasonable in its desire for an independent environmental impact study. Uruguay truly requiring investment inflow, is clearly justified in its desire to protect an enormous capital and employment injection. Given that both sides feel they are “right” and have entrenched themselves in their positions, arriving at an optimal solution is a challenge. However, if they do not work to resolve this issue between themselves, and allow The Hague to solve their problems, everyone might lose.

OPTIONS: WHAT TO DO NEXT?

There are three readily visible conflict-resolution options for these parties: pursuing the arbitrated-settlement route to its fullest, coming back to the negotiating table, embarking on tri-lateral discussions. These are not necessarily mutually exclusive options, however they result in potentially different outcomes.

Option 1: External Arbitration – in the Hands of the ICJ & Mercosur’s Olivos Protocol

Leaving the resolution of this dispute with the ICJ is an option where neither party is assured of attaining its objectives. Argentina requests that the ICJ declare Uruguay in breach of its contractual obligation as established in the *Trato*, including a sub-articles stipulating the “obligation to take all necessary measures to preserve the aquatic environment and prevent pollution; the obligation to protect biodiversity and fisheries, including the obligation to prepare a full, objective study on environmental impact; the obligation to cooperate in regard to the prevention of pollution and the protection of biodiversity and fisheries.”⁴⁴ Argentina also requests that the Court require Uruguay to “...cease its wrongful conduct and comply scrupulously in the future with obligations...” and Argentina seeks full reparation of injuries caused by Uruguay’s conduct. Finally, in its request for provisional measures Argentina states its belief that damages arising from continued construction of the mills will be such that financial or other material reparations will not be able to compensate.⁴⁵ (It is unclear if this relates strictly to mill construction during the ICJ deliberation process or the mill construction in general.)

⁴⁴ “Argentina Institutes Proceedings Against Uruguay & Requests the Court to Indicate Provisional Measures.” International Court of Justice Press Release 4 May, 2006 www.icj.org

⁴⁵ *ibid*

With this case, it is the first time that a World Bank project is brought before the Court. The Argentinean government has lobbied the international lending organisations involved to withhold loan approval until the independent environmental impact study is conducted, and the Uruguayan government has lobbied these same organizations for rapid approval. To date the Bank has yet to approve the US\$400 million loan.⁴⁶ It is unclear if the World Bank will release the funds prior to an ICJ ruling, though the speculative conclusion is that it will not.

This is a road to resolution already embarked upon. Cynically, one could argue that this is a very astute strategic move for both countries. If ICJ makes the decision, then the two governments can go back to their constituents and third-party stakeholders saying, “Yes, I know you were right, and I supported you all the way, but this is how the ICJ ruled. The final decision was out of our hands and now we must abide by it.” Therefore, it is also an excellent example of “blame-shifting” in the case of an unfavorable resolution.

If the ICJ rules in favor of Kirchner’s government for the provisional measures and for the overall case, Uruguay is faced with reparations payments to Argentina, probable damages payments to Botnia, and potential payments to ENCE. Argentina will have gained a “win” in terms of international recognition that it was “right” and indeed Uruguay violated terms of the *Trato*. A further consequence may be a full block of World Bank credit, preventing the construction and effectively ending the *papeleras* project on the Uruguay River. However, there are consequences that must be considered: the economic impact on Uruguay in the short term and in the long term as a “safe” recipient of fdi; the economic impact on Argentina – what it gains in terms of tourism and property value in one corner of one province may be insignificant compared to what it may lose in future fdi and the advantages this may bring. Both countries will have forestry programs and policies that may be stymied and hence never realize a full return on investment.

From an environmental perspective, on the positive side the Uruguay River and its general vicinity will be saved from certain levels of water and air pollution, the highways will not be congested and damaged with logging trucks carrying up to 40-ton loads,⁴⁷ and there will be less incentive for mono-culture planting. However, an ICJ ruling affects only these two countries and may not incentive a “race to the top” for environmental standards in the Southern Cone, be it in forestry and paper production industries or any other. Industrial investors will go to “friendlier” countries within the region, such as Brazil, or perhaps switch regions entirely, ending possibly in a “race to the bottom.”

If Uruguay was truly concerned about the ICJ ruling, they could have moved to block this action as the 4 May submission date was known well in advance and highly publicized. There was no surprise. It could be argued that going to Mercosur under the Olivos Protocol is one way to counter an ICJ ruling – i.e., if the ICJ rules in favor of Argentina and Mercosur in favor of Uruguay then both presidents will have had a ruling in their favor and they can go home a “hero” in the eyes of their constituents. It is, in a twisted sort of way, equalizing. However, the solution in both cases is outside the hands of the primary actors.

Whether conscious or not, these are interesting moves on Uruguay’s part. If the ICJ rules in favor of Uruguay – that there was an agreement between the two countries as early as 2004 over this issue – then Argentina sustains significant fdi potential damage,

⁴⁶ “Argentina, Uruguay at Loggerheads over Pulp Mills on Shared River.” *Environment News Service*. 10 May, 2006 www.ens-news.com

⁴⁷ *ibid* Argentina,

Uruguay's financial risk is minimized in the short and long run, and the region will be subject to undetermined but certain levels of environmental damage, affecting both countries. If such a ruling is coupled with Mercosur ruling in favor of Uruguay then it is a double Uruguayan gain and at least a double Argentinean loss. It would be a purely distributive resolution as Argentina would sustain financial loss, environmental damage, and a psychological impact at the level of civil society that has not been considered. In delivering a decision, Mercosur is put in a tight spot for two reasons. First, it has come under severe criticism for unfair treatment of its smaller trading partners – one reason Uruguay has threatened to withdraw from the accord. If it rules in favor of Argentina, Mercosur and its dispute resolution mechanism risks being perceived again as biased, still favoring a more powerful member. This further undermines the institution's credibility, further weakens it, and gives Uruguay yet another reason to sever ties. Second, it has been considered very bad form to rule that an environment matter is a trade obstacle in disputes pitting environmental protection against free-trade protection.⁴⁸ This is one point in Argentina's favor with respect to a Mercosur mediated dispute.

The presentation of consequences here and the continual return to the loss of present and future FDI is not an argument to allow the persistence of low environmental standards in the name of development. It is however, a question of objectives. If raising environmental standards is an objective – as it is of the *ambientalistas* and, given his posturing, it is assumed of Kirchner, then one must look at whether the option at hand helps achieve the objective. Giving the responsibility of resolving this dispute to the ICJ or Mercosur does not make immediate room for achieving a long term, policy-shifting environmental objective. An arbitrated solution could work directly against Uruguay's objectives, and while Argentina might see its aim of environmental impact studies met, at what long-term cost?

Option 2: Return to the Negotiating Table – is it round?

Neither the ICJ nor Mercosur's Olivos Protocol preclude parties reaching negotiated settlement during the arbitral proceedings, hence Argentina and Uruguay could return to the negotiating table and try to find a resolution. Because talks have broken down so severely, it would be important to find areas where agreement could be reached prior to moving on to more difficult topics. Again, it is important to recall that initially the governments had more points in common than with the third party stakeholders acting behind the scenes. It would be hard to believe that all points of commonality have been erased with time. A successful bi-lateral negotiation may need to be just that – between two parties with third parties as frozen out as possible. This however, is highly unrealistic.

Any successful negotiation at this point will require very clear objectives on the part of the key actors, and extraordinary clarity on the areas and degrees of concession. For example, if Uruguay's objective is the fdi, and conceding environmental impact studies could potentially threaten this aim, then perhaps a location for the mills could be found where any environmental impact would be strictly a cost to Uruguay and not also to Argentina. This could be an option. However, for ENCE who already has been operating

⁴⁸ Class notes: Sciences-Po Masters Public Affairs 2005-2006. Course: Interest Groups & Public Policy. Professor: Cornelia Woll. 19 April, 2006. This was evidenced in a case between Denmark and the European Union over recycling methods. The ECJ ruled in favor of Denmark. A secondary consequence was the strict recycling rules currently in effect in Germany and being adopted to varying degrees by other EU member states.

in the area and undertook building a port on the Uruguay River to facilitate its operations, it would be a sub-optimal solution.⁴⁹ A mid-way agreement could be achieved whereby ENCE stays and Botnia moves. However, while the governments could agree to this in principle both multinationals would also have to agree. Again, this does not seem highly likely, particularly not if one is Botnia. It also does not satisfy the *ambientalistas*.

Another solution within this option is to have construction continue while environmental impact studies are conducted and then a final determination made based on the findings. The problem here is that if the environmental impact studies do indeed demonstrate significant damage to the waterway, roadways, and air quality under what authority can one stop the construction? Uruguay will have even greater reparations to pay, and will not agree to a situation where this may be the case. If the environmental impact studies reveal no potential or significant damage, then it has been much ado about nothing, and Argentina is in an even weaker position internationally.

Returning to a negotiating table, hopefully a round one – conducive to collaboration – may require a third party facilitator such as Brazil or Chile. While Brazil has indicated openness to playing such a role, it may not be an ideal choice given neutrality-of-interest concerns. Brazil has more than its fair share of paper mills with similar or older technology than that proposed by ENCE and Botnia. It may or may not want a solution that could promote a race to the top as it might jeopardise its own fdi negotiations for future mills. Additionally, being Mercosur's 'alpha' nation, if in negotiations it did not manage to appear entirely neutral, Mercosur's objectivity would again be called into question.

Chile may be a better facilitator option for a number of reasons. First, it is not a leader in Mercosur. Second, while it retains a cordial relationship with both Argentina and Uruguay it is not necessarily closer to one than the other. Third, in March it was the outgoing Chilean Lagos administration that brokered the meeting between Kirchner and Vázquez. So far, so good. It is the fourth reason, which throws a kink into the possibility vis-à-vis neutrality. Chile is facing its own paper-mill induced environmental woes in the south, where a pulp mill was built near an ecological sanctuary. Hundreds of black-neck swans and other bird species have died. The Lagos government shut the mill for a period, loosely sanctioning it (US\$25,000 fine) and finally permitting its reopening with technical modifications. These adjustments could reduce impact on the ecological sanctuary, but would divert environmental damage to the Pacific shoreline ecosystem instead.⁵⁰ Recently, an even larger pulp-mill was approved for construction.⁵¹ What will come of this project under the new Bachelet administration is yet to be known. Hence, Chile could be a reasonable facilitator because it has faced these same troubles and has already successfully brought both parties together in the recent past. Whether or not Chile would remain neutral or be perceived as remaining neutral is a question mark. To date, there has been no mention of Chile entering the fray as a mediator or negotiations facilitator.

Reopening negotiations is ideal, but potentially difficult to realize. There appears limited room for agreement. Argentina will insist on independent environmental impact studies, though who pays for these and how they are structured can be negotiated. This is a step in the right direction. However, it will require Uruguay to agree, and for Uruguay to

⁴⁹ In January 2007 this conflict continued. However, when visiting Uruguay in December 2006, the author learned that ENCE decided to move its plant further down river.

⁵⁰ González, Gustavo. "Uruguay: Mixed Reactions to Truce in Paper Mill War." 11 March, 2006 www.corpwatch.org

⁵¹ *ibid*

agree it may need to bring both MNCs on board. This route was already tried in March and failed. Could it work again? Argentina will also continue to use all tools possible to ensure the studies are conducted, including a request that international funds be contingent on their completion, thereby stymieing the project. Effective, but not a tactic that creates good-will. Uruguay will protect the investment, and maintain that it is the victim Argentinean unfair trade practices, resulting in hundreds of millions of dollars in lost income. Intrinsically Argentina must be rather sympathetic to the first instance given its own investment and economic needs, and there is little that will protect these investments short of continued construction, either in Fray Bentos or elsewhere. It is therefore, in the area of trade damages that Argentina could concede. This may be a realistic move on its part and also could potentially serve to re-instill faith among the smaller nations in the Mercosur process. Hence it could serve a dual purpose: help resolve the conflict and strengthen Mercosur.

Option 3: Selective Party Expansion

Returning to the negotiating table could take on a different dimension if there was selective expansion of the parties present, for example Argentina, Uruguay, Finland, and Spain, or Argentina, Uruguay and the MNCs. Possible areas of negotiation include location of the mills, use of the most up-to-date technology, and funding.

Such talks would first require that Argentina and Uruguay are clear on their objectives and have some common ground. For both Kirchner and Vázquez it would be better tactically to have their foreign ministers and/or cabinet chiefs first meet with their European analogues to determine the parameters around which an agreement might be reached.

For facility sake, if this option were pursued, it may be easier to first to speak with the Finnish as their project and company is more contentious at present. More importantly however, is the evaluation with whom to talk: government or MNC. It may be politically safer to maintain tri-lateral discussions among sovereign nations than between nations and enterprise, particularly in Latin America where emotions run high over the relationship of governments to investing foreign corporations, especially when these governments appear “weak” or “cave-in” to MNC demands.

Hence, utilizing this option may only be viable if both countries have arrived at some sort of agreement among themselves as to how they would like to see the problem resolved, and if these solutions require agreement by the MNCs, for example moving the mill location or investing in the highest standard technology. If Uruguay were to approach the MNCs with this request it is unlikely they will get far, and they may not agree to do so out of fear of investment loss. Argentina might wish to approach the companies directly but this is unlikely to be appropriate, nor productive. However, both countries can speak to the corresponding sovereign governments. While governments do not usually get involved in the affairs of their nation’s enterprises, if it is a question of two “peers” needing the assistance of a third with respect to a business entity that is within its jurisdiction, then perhaps it is not unimaginable. How a government would incentive their corresponding company to agreement is an issue outside the scope of this discussion and depends on the creative solutions developed by the governments involved.

There is an “image” incentive for everyone to pursue this route. For the Latin American countries, it permits them to negotiate indirectly with the MNCs via governments. For the Finnish it might enhance their “environmentally-aware” status. They are considered among the environmental-standard leaders with some of the “cleanest” firms in the world. If the government can induce one of their own companies to be a pioneer in

utilizing the most advanced, cleanest technology in developing countries (who are not known to require such strict standards) then they can only improve their environmental status. While it may not be cost effective to promote a “race to the top” in a region half way around the globe, it does fit within the ideology espoused not only by the governments but by the companies themselves. It is a case of “practicing what you preach,” and here the Finnish government is in a position to ensure this is upheld. In the case of Spain who does not have the same environmental track record as Finland, this option could help improve their position on the environmentalist ladder. While this may cost the foreign investors more in Fray Bentos, in the long run, if standards are higher for everyone there is an adaptability factor, and companies adjust to a new cost level, which will no longer be viewed as high.⁵² Once companies are accustomed to a higher standard, then that becomes the norm. It is a question of pushing them to that bar. It may also be less costly for these companies to invest in the newest technology available than to risk losing their investment to date.

What could such an approach accomplish? It could provide well-constructed additional options. Since no progress has been made bi-laterally it may be time to look beyond the readily obvious and logical. Opening discussions to the Finnish and Spanish is significant as at present it appears that the mills will be affected either by a construction delay depending on the ICJ provisional measures ruling, and/or by a funding delay since the World Bank has yet to grant the loan and may make it contingent on the outcome of independent expert studies and the implementation of their recommendations.⁵³ It is only with all parties at the table that everyone’s needs can be met: Uruguay’s development program, Argentina’s environmental concerns, European environmental image and investments, and the Southern Cone’s environmental policy future.

Regardless of the option taken: third-party arbitration, continuing the bi-lateral negotiations, opening up tri-lateral discussions, these two parties need to refocus on finding commonalities and identifiable solutions, breaking the present circular discussion of “violation of bi-lateral agreement and independent environmental impact studies” versus “no agreement violation but anti-free trade practice.” The Uruguayans have not been against the impact studies. In fact, they made room for them to take place. Where the governments are not seeing eye-to-eye is on the nature of the disagreement: Kirchner has not explicitly rebutted the trade barrier argument of the Uruguayans, nor has he explicitly defended the *ambientalista* statement of “*no a las papeleras*,”⁵⁴ and while the Uruguayans maintain there was an accord in 2004 their evidence is not strong. Therefore, if they could agree on the environmental impact studies, the other two areas could be tackled. Minimizing the voice and pressure of third-party stakeholders may be the only way for this to occur.

SOLUTIONS?

If one bases solutions on the options explored, it appears a negotiated resolution to this conflict, if even possible, depends on re-establishing bi-lateral discussions. Initial points of commonality seem to have been forgotten. Why? Perhaps as a natural by-product of

⁵² Unfortunately, through the research undertaken the cost differential between the proposed technology and the newer technology was not determined.

⁵³ Carbone, Florencia. “Reclaman mejoras técnicas a las papeleras” *La Nación*. 10 May 2006

⁵⁴ Yebra, Martín Rodríguez. “Apareció el mediador más poderoso”

position-entrenchment and nationalism. Perhaps because, aware of his weak-points, Botnia told Vásquez that the investment would be in jeopardy if environmental impact studies were undertaken. While a “bullying” theory is often difficult to believe, anything is possible.

In light of the fact that Argentina is pursuing the ICJ option as established in the *Trato del Río Uruguay*, continuing negotiations will be under the shadow and pressures of this particular move. There is speculation that the Court’s ruling will be favorable to Uruguay,⁵⁵ in which case, Argentina’s only hope remains the World Bank withholding funds until studies are undertaken and/or a bi-laterally negotiated solution is achieved. The constraint is that the solution for Argentina rests with these studies. Meanwhile for Uruguay the solution is to permit the construction and closely monitor the result for environmental damage. Each party has only one solution in mind and the solutions do not appear to coincide.

Based on late breaking news, it would seem that the most realistic solution has just presented itself. It combines elements of option two – introducing an external mediator – and elements of option three – tri-lateral talks – in this case held indirectly through this outside entity. There is evidence that the World Bank, wittingly or unwittingly just became the mediator.⁵⁶ The International Finance Corporation (IFC) announced in early May its request to both Botnia and ENCE for more in-depth ecological information, a technology review and finally the acceptance of independent environmental auditors to study the project.⁵⁷ Botnia and ENCE have proposed an action plan to study the recommendations made late 2005 by the Canadian-led team.⁵⁸ The loan clearly will be contingent on report outcomes and compliance.

The World Bank has never approved loans for projects that spawned litigation and hence The Hague’s involvement has catapulted the issue of the *papeleras* into a different investment classification. In addition, both the Bank and the Finnish national credit agency have indicated that this dispute development increases so significantly the mills’ political risk rating that loans are likely to be contingent on its resolution.⁵⁹ This may be what it is required to get Uruguay and Argentina speaking again. Therefore, it is possible that the solution will derive from financial necessity and not diplomatic finesse.

CONCLUSION

This multi-faceted case illustrates numerous aspects of dispute resolution including scope, behavior, third-party impact, and the importance of looking beyond the readily apparent. It effectively demonstrates how a conflict escalates, in this case from a local (albeit bi-national) agency level to an international one. If one looks at CARU, the *Trato* and the difficulties Uruguay and Argentina encountered in initial negotiations under this structure, it also shows that accords with built-in dispute resolution mechanisms are not foolproof measures to avoid large-scale conflict. Whether or not Argentina had taken this issue to The Hague early on in the dispute as permitted by the *Trato* has not been explored, but

⁵⁵ Ybarra, Gustavo. “Seis juices de la Corte de La Haya no respaldarían a la Argentina.” *La Nación* 7 May, 2006 www.lanacion.com.ar

⁵⁶ Yebra, Martín Rodríguez “Apareció el mediador más poderoso”

⁵⁷ *ibid*

⁵⁸ Carbone, Florencia. “Reclaman mejoras técnicas a las papeleras”

⁵⁹ Yebra, Martín Rodríguez “Apareció el mediador más poderoso”

strategically Argentina may have decided to hold back from this instrument-of-last-resort-given an unwillingness to jeopardize an existing collaborative relationship. We have also seen how an issue that appears relatively simple with openly articulated positions is like looking at an ocean: what you see happening on the surface is not what is happening below. This conflict can be presented in multiple ways: a bi-national diplomatic conflict, an environmental disagreement, a free-trade fracas. It is all of this and more, including the possibility for an enormous shift in how developing nations manage their environmental policy vis-à-vis MNCs.

Behaviorally, the case of the *papeleras* demonstrates that cordial, even close, relations between negotiating parties can sour, and the negative consequences of position entrenchment. Argentina and Uruguay have a shared history, close cultural ties, and leaders who were supportive of maintaining such a relationship. In part, the collapse may be due to the fact that the problem was inherited from past leaders, and with the breakdown of initial talks a feeling of impossibility set in. The surge of nationalism in both countries where civil society (excluding environmental groups) stands on opposite sides regarding the *papeleras* is a significant element explaining behavioral nuance. As we have seen, the Uruguayan population is generally favorable to the mills, whereas the Argentinean populace is generally against their construction. Finally, we see how fundamental agreement on issues can get buried or forgotten amongst those where there is no agreement or ones where third party stakeholders have a stronger voice.

The power wielded by third parties cannot be underestimated nor ever ignored. Such groups might be the worst enemies or strongest allies of a negotiated solution. We have seen both: Botnia and the *ambientalistas* each for their own reasons and in their own ways worked against a negotiation. However, the role of the World Bank as well as Finnish financial institutions highlight how a more peripheral or long-time silent actor can suddenly leap center-stage pushing and shaping the parameters of a solution in unique ways. Currently, these actors also may become instrumental in the resumption of bi-lateral talks, hence resolution allies.

There is the lesson of looking for solutions beyond the immediately apparent which must be learned. While this conflict is not yet resolved, and it continues to remained true to its roller-coaster, stop and go nature vis-à-vis a negotiated settlement, having opened the resolution scope may lead to previously unseen options and solutions, where objectives can be met, leaders can face their constituencies, and the environment remain intact.

Concretely, Mercosur's disintegration as a result of this conflict appears unlikely. How Argentina and Uruguay will continue to rate as investment partners depends greatly on the dispute's outcome and how the outcome is achieved. The same holds true for the conflict's impact on Southern Cone-enhanced environmental standards in connection to industrial policy. While a race to the top in environmental standards is just as imaginable as a race to the bottom, given the power and press enjoyed by the *ambientalistas*, the increased awareness of civil society regarding environmental and public policy issues, and the increased transparency that has resulted, one can only hope for a significant shift in the future. Whether or not it will come all at once or incrementally over time remains to be seen.

World leaders are gathering in Vienna this week (10 May, 2006). Perhaps this will lead to the next, hopefully penultimate, chapter of a long and intriguing story between neighbors – the final chapter of course, recounting the details of a negotiated settlement.

*Table 1**Comparison of Forest, Pulp & Paper Industry Infrastructure in Southern Cone Countries*⁶¹

	<i>Argentina</i>	<i>Brazil</i>	<i>Chile</i>	<i>Uruguay</i>
<i>Managed Forest (millions of hectares)</i>	1.5	5	2.1	0.8
<i>Pulp & Paper Mills</i>	10	241	13	construction

⁶¹ *ibid* p. 3. There is a discrepancy in the published figures for number of paper mills in Brazil and Argentina. Malamud's citations are indicated above. Other sources state 220 *papeleras* in Brazil and 60 in Argentina. It is worth noting however that these last statistics are mentioned by an Uruguayan politician. Malamud is a Senior Analyst in a Spanish think tank, specializing in Latin America. It may be a question of definitions: strictly pulp mills versus other types of paper processing plants.

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THE GOVERNMENT USE OF PATENTS IN THAILAND: THE THAI GOVERNMENT & ABBOTT LABORATORIES

Isabel Morales Martínez

ABSTRACT

This chapter focuses on the conflict that arises between pharmaceutical companies and national governments in the question of compulsory licensing. The example selected in this article describes the Thai government's use of patents – within the TRIPS – specifically related to the antiretroviral drug Lopinavir+Ritonavir (Kaletra®) from Abbott Laboratory as well as Abbott's response. What follows is a simulation of the starting of formal negotiations between the Thai Government and Abbott in order to try to minimize the negative effects that occurred after 24 January 2007 - when the Thai Government issued a compulsory license for Kaletra® - such as the decision of Abbott to not launch 7 new drugs in Thailand and the subsequent boycott of Abbott products called by non-governmental organisations (NGOs). The article is descriptive and narrative due to the fact that access to confidential information of key stakeholder governments and institutions remains limited. The aim is to propose a hypothetical negotiations scenario in order to illustrate how a constructive solution could be developed and agreed upon by multiple stakeholders.

SITUATION SUMMARY

The Thai Government declared that the Ministry of Public Health had tried unsuccessfully “to discuss and negotiate with the patent holders through several means and mechanisms between 2004 to 2006.”¹ Subsequently, the Government of Thailand's Public Health Ministry announced the Government Use of Patents (public use of patent rights²) on 3 patented drugs, i.e. on 29 November 2006 on Efavirenz (Stocrin®) by Merck Sharp and Dohme, on 24 January 2007 on Lopinavir+Ritonavir (Kaletra®) by Abbott Labs and on 25 January 2007 on Clopidogrel (Plavix®) by Sanofi-Aventis³.

This was done in order to cope with a social movement aiming to improve access to essential medications and the health of Thai people.

Since 2001, every Thai citizen has been covered under a national public health insurance scheme. This was expanded in 2002, with the National Health Security Act declaring universal access to essential medicine for all Thais.

At present, there are three different National public health insurance schemes⁴:

1. *The Civil Servant Medical Benefit Scheme (CSMBS)*: This program covers approximately 5 million civil servants, public employees and their dependants. The scheme is based on a fee-for-services retrospective reimbursement system

¹ The Ministry of Public Health and the National Health Security Office Thailand February. “Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand”. *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Pages 4 and 5.

² Ibid. Pages 2-3 and document n°4.

³ Ibid. Documents n° 5, 6, 7, 8, 9 and 10.

⁴ Ibid. Issue N°1.

paid for entirely through general tax revenue. The main service providers under this scheme are public facilities.

2. *The Social Security Scheme (SSS)*: This program covers about 8.5 million private employees and temporary public employees. It is a tripartite system with contributions coming from employers, employees and the government on an equal share basis; thus public and private facilities have approximately equal share of beneficiaries. This scheme pays the providers through a contract capitation system.
3. *The Gold card scheme (Universal Coverage)*: This program covers around 48.5 million people or 78 per cent of the population. It is financed solely by the general tax revenue and it also pays the providers through a contract capitation system. Currently, public hospitals are the main providers covering more than 95 per cent of the beneficiaries. In addition, 80 private hospitals joined the system, covering around 4 per cent of the beneficiaries.

Hence, under the National Health Security Act 2002, a total of 62 million of Thais are covered by national public health insurance schemes and as such are entitled to full access of all medicines on *the essential drugs list*,⁵ including almost 900 drugs, many of which are patented. Furthermore, since October 2003 the Thai Government also committed to the policy of universal access to antiretroviral drugs (ARVs) for AIDS patients.

On 5 January 2007, five weeks after the announcement of the Government Use of Patents on Efavirenz, the GPO (the Government Pharmaceutical Organization)⁶ signed a contract with Ranbaxy, an Indian firm, to import 66.000 bottles of Efavirenz, with a reduced price of 650 bath/bottle (from 1.400 Bath/bottle), allowing the Government to provide this drug to 20.000 more AIDS patients than before at the same cost.

Abbott is one of the world's largest pharmaceutical companies and it has a large market share in Thailand with its anti-retro viral drug Kaletra® used for people living with HIV/AIDS, as well as with four other leading pharmaceutical products (two antibiotics, Erytab® and Klacid®, the pain killer Brufen®, and the slimming pill Reductil®).

After the Thai Ministry of Public Health announced on 24 January 2007 the Government Use of Patents on its patented drug Kaletra®, Abbott protested by indicating on the first half of mars 2007 that it would not launch seven new drugs including a new formulation of Kaletra® and the painkiller Brufen®, an antibiotic called Abbotec®, Clivarine® to prevent blood clots, the arthritis drug Humira®, and the high-blood pressure drugs Traka® and Zemplar® for patients with kidney disease.

Next, by the end of March 2007, there has been a massive response to Abbott reaction from several groups such as Bangkok-based health advocacy groups (who are trying to boycott Abbott's products at a national and international level); the Thai Rural Doctors Society, the GPO (the Government Pharmaceutical Organization), Médecins sans Frontières, and various other consumer networks.

SCENARIO BUILDING OF THE CONFLICT

The current situation is that of a breakdown of negotiations between Abbott and the Thai Government. Both parts have engaged in *distributive bargaining*, looking for the greatest profit for themselves independently. Hence, the other party is automatically pushed into a

⁵ Ibid. p. 2.

⁶ <http://inter.gpo.or.th/>

loss making position. This type of bargaining is also called a *fixed sum or zero sum game*; because as new values have not been created, gains and losses will always add up to zero.⁷

This paper is the hypothetical development of new negotiations, an analysis of their possible evolution and a proposal for potential solutions based on the hypothesized scenarios.

The *integrative bargaining* theory – aiming to search for solutions that leave no losers behind, increasing and creating new values for both parties through creativity and exchange of concessions – will be applied. Integrative bargaining enlarges the scope, permitting negotiators to deal with several issues simultaneously and making exchanges or trade-offs possible.⁸

The beginning of the negotiations

To begin, one could consider that international organizations such as the WHO would support the renewal of negotiations between the Thai government and pharmaceutical companies, such as Abbott Labs, in this case.

The WHO report on Public Health, Intellectual Properties and Innovation clearly declared that access to essential health technologies depends on “3D’s”:

- *Discovery*: Investment in research to discover the etiologies and mechanisms of diseases and new drugs and health technologies to deal with them.
- *Development*: These potential innovations need further investment to develop them into effective, safe and good quality innovations or alternatives to existing treatments.
- *Delivery*: Adequate financing is needed in order to produce, purchase and distribute these new technologies through adequate and effective health care delivery system.

Furthermore WHO Director General, Dr. Chan, expressed in a letter to the Thai Minister of Public Health that “WHO unequivocally supports the use of the flexibilities within the TRIPS agreement by the developing countries that ensure access to affordable and high quality drugs.” Besides Dr. Chan recognizes that “there’s no prior requirement to negotiate with patents holders before issuing a compulsory license.”⁹

Nonetheless, Dr. Chan stated that “it is essential to ensure a right balance between the immediate and urgent pressing need to provide affordable medicines, and the need to provide continuous incentives for innovation.”¹⁰ Consequently, in this regard Dr. Chan noted that “prior negotiations with the industry would be a pragmatic approach that may ensure countries to have access to high quality medicines at affordable prices.”¹¹ Besides, the Thai government is open to reestablishing negotiations and the Minister of Public Health signed a ministerial order to establish a new Committee for negotiation of patented drug prices on 16 February 2007, which will be responsible for negotiations with the

⁷ Saner, Raymond. *The Expert Negotiator*. Chapter: 4.

⁸ Saner, Raymond. *The Expert Negotiator*. Chapter: 4.

⁹ The Ministry of Public Health and The National Health Security Office Thailand February. “Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand”. *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Document n°13.

¹⁰ Ibid.

¹¹ Ibid.

pharmaceutical companies, before and after having announced and implemented the Government Use of Patents.

The response of Abbott Laboratories' after the Thai announcement to apply the Government Use of Patents on Kaletra® has not been collaborative until now. Nonetheless, a source from the pharmaceutical industry declared recently that they are alarmed at the developing country's interpretation of the TRIPS flexibilities and that it is time to have a serious conversation about all these new aspects. In addition this industry source stated that all parties have to acknowledge that everyone has a role to play.¹² Accordingly, we could expect in the coming months that the Thai Government will start negotiations with the pharmaceutical industry, including Abbott Labs.

Initial informal negotiations might have broke down because of intense pressure due to the lack of a ZOPA¹³ (Zone of Possible Agreement) between the Thai Government and Abbott. Hence, the hypothesis of a possible evolution of this new round of negotiations, and the main objective will be to build up a ZOPA to permit a positive outcome of the negotiations.

Analysis of the possible evolution of the negotiations

The issue at stake is very demanding, with high technical and planning complexity. Hence, negotiations should allow time for rethinking and planning, as the further the parties positions deviate one from another and the more complex the issue, the longer the negotiation will be.¹⁴ Furthermore, negotiations ought to be divided into several phases, according to the model of the four basic phases of negotiation – warming up, presenting the position, edging closer, and conclusion or breakdown – taking into account that in practice these different phases can differ slightly.¹⁵ The following four phases and their dates are hypothetical scenarios of how negotiations with Thailand and Abbott might have evolved in a fruitful way applying the theory of integrative bargaining. Hence, the aim of the paper is solely narrative.¹⁶

Phase 1 – The Warm Up

In this phase one can assume that both teams of negotiators meet in a welcoming atmosphere and layout the first overview of the issues.

- The Minister of Public Health established on 16 February 2007 a new committee responsible for the negotiations. The Committee for Negotiation of Patented Drug Prices is composed of 15 members, among them the permanent secretary of the Ministry of Public Health as an Advisor, the Secretary General of the Thai Food

¹² Intellectual Property Watch. "Drug Company Reacts to Thai License; Government Ready to Talk".

¹³ Saner, Raymond. *The Expert Negotiator*. Chapter: 2.

¹⁴ *ibid.* Chapter: 7.

¹⁵ *ibid.* Chapter: 7.

¹⁶ Actually, all similarity from the scenarios on this paper to reality is coincidence and in fact the current situation was that on April 10, Abbott agreed to lower the price of Kaletra® and Aluvia® (the heat stabilized version of Kaletra®) for NGOs and governments of 40 countries, arguing it was a result of an agreement with WHO. Nonetheless, Abbott stated that unless the Thai government declares that will not issue further compulsory licenses, it will not register its new products in Thailand. For more information see 8th May 2007 Third World Network article: <http://www.twinside.org.sg/title2/health.info/twninfohealth087.htm>

and Drug Administration as a Chair; and the Directors of the Department Disease Control and Health Services are among other members.¹⁷

- After some internal discussions, Abbott reconsiders taking part in a new round of negotiations. The Abbott negotiating team is comprised of 6 *Corporate Abbott diplomats*¹⁸ which understand the culture of the business unit (the Thailand level) as well as the corporate culture (transnational); by 6 *Business Abbott diplomats*¹⁹ (specially trained to deal at a national as well as at an international level with interest groups, NGO's and other Civil Society actors) and finally by 3 Abbott Scientists specialized in Research for new drugs in AIDS and in the study of the use of AIDS drugs and the development of drug resistances and intolerances.

The hypothesized scenarios are conducted in April and May 2007. The narrative starts on Monday, 16 April 2007 when both teams of negotiators met and through an informal discussion, reported by the media to be very friendly and constructive; both sides stated that they fully understand the concerns of the other. On one side, the pharmaceutical company indicated that it would make larger efforts to develop new proposals to help the government achieve the goal of universal access. On the other side, the Thai Government conceded that it will try to ensure that their current market for patented drugs in Thailand will not be disturbed. At the end of this informal meeting they agreed that they would meet the following Monday to begin the official negotiations.

A few hours later, an official note by the Thai government informed that the next round of negotiations would not be open to the public, but noted that a report of the outcome would be issued when the agreement was reached, and that certain civil society actors would be included in the last stage of the negotiations to work together with the Thai Committee, and ensure transparency and accountability in the process. Thus, in this hypothetical phase of warming up both parties are willing to start formal negotiations.

Phase 2 – Positioning:

The official discussion between the Thai Committee for negotiation of patented drug prices and the Abbott team of negotiators took place as scheduled.²⁰ Negotiations started at 8:30 a.m. at offices in the Thai Ministry of Health. During this day-long official meeting, with adequate pauses for lunch and coffee, both parties exposed their initial positions, exchanged their arguments and refined their positions. The meetings continued in the same manner on Tuesday and Wednesday, enabling both parties to gather significant information in order to prepare viable and efficient proposals to their opponents, aiming to identify a ZOPA, thereby making an agreement feasible.

¹⁷ The Ministry of Public Health and The National Health Security Office Thailand February. "Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand". *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Document n°19.

¹⁸ Saner, Raymond. *The Expert Negotiator*. Chapter: 11. page 222-223.

¹⁹ *ibid*.

²⁰ Scheduling negotiations and organizing them appropriately is essential in order to minimize stress and to enhance the possibility of a positive outcome. Saner, Raymond. *The Expert Negotiator*. Chapter: 13.

Scenario of the initial Thai government's position:

The Thai Government's goal is to improve the health and access to essential medicines for Thais, aiming to use intellectual property systems in a more conducive manner for social development. The Thai Committee stated that the Government Use of Patents is fully in accordance with TRIPS²¹, and reminded Abbott that when countries signed TRIPS, the Compulsory License mechanism came together with accepting the patenting of medicines. Hence, countries that used the government use of patents should not be marginalized.²²

In addition, the Thai government quoted Dr. Buddhima Lokuge of MSF "What good are the flexibilities built into world trade law if countries will be penalized for using them?"²³.

The Thai government also declared that many countries have or were trying to implement those legal mechanisms to improve access to drugs according to TRIPS.²⁴ It also reminded Abbott that the laboratory itself had asked for a compulsory license in the US from Innogenetics²⁵ (a Belgium-based international biopharmaceutical company)²⁶.

Moreover, the government firmly stated that "we do need innovative ways to provide incentives for drug research and development to improve access to essential drugs for all ... but ... Public Health interest and the life of the people must come before commercial interests" and quoted Albert Einstein: "We shall require a substantially new manner of thinking if mankind is to survive."²⁷

Furthermore, the Thai Government stated that Merck Sharp and Dohme kindly proposed on 6 February 2007 a very favorable new price for Efavirenz at 72 cents per tablet of 600mg, bringing the cost to approximately 780 Baht/bottle – a price closer to the generics (650Baht/bottle) – and that Merck Sharp and Dohme also announced a global price reduction of Efavirenz. Here, the Government emphasized that "Thai Government Use of Patents not only benefits Thai people but also people all around the world."²⁸

²¹ The Ministry of Public Health and The National Health Security Office Thailand February. "Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand". *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Documents n°1, 2, 3 and 4.

²² Patriota, Guilherme. Intellectual Property Watch. <http://ip-watch.org/weblog/wp-trackback.php?p=563>

²³ Lokuge, Dr. Buddhima. "Notes from March 16th 2007 U.S. Capitol Briefing on Thailand's Compulsory Licenses" KEI (Knowledge Ecology International). 16 March 2007. http://www.keionline.org/index.php?option=com_content&task=view&id=37

²⁴ The Ministry of Public Health and The National Health Security Office Thailand February. "Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand". *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Documents n°14 and 15.

²⁵ Innogenetics. <http://www.innogenetics.com/site/company.html>

²⁶ Third World Network. 8th may 2007. <http://www.twinside.org.sg/title2/health/info/twninfohealth087.htm>

²⁷ The Ministry of Public Health and The National Health Security Office Thailand February. "Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand". *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Preface.

²⁸ Ibid. Documents 5, 8, 20 and 21.

In addition, the Thai Government showed Abbott that they had received many letters reflecting international support of the Thai Government's announcement on the Government Use of Patents of those 3 drugs. Letters of support came from very different correspondents, expressing different specific concerns:

- 26 December 2006, Dr. Peter Piot, Executive Director of UNAIDS, sent a letter of appreciation for the Thai Government's action on Efavirenz²⁹.
- 29 December 2006, Nicolas de Torrente, Director of *Médecins sans Frontières (MSF)*, USA, and Paul Cawthorne of MSF Thailand sent a letter of appreciation and support to Honourable Condoleezza Rice, US Secretary of State and to Ambassador Susan Schwab United States Trade Representative, concerning the Thai Government action of Efavirenz and also expressing that the US government should refrain from opposing or interfering in Thai actions.³⁰ Plus, a letter addressing the same issues was sent from Director of the Consumer Project on Technology, James Love, New York, USA, dated 11 December 2006 to Ambassador Susan Schwab.³¹
- 10 January 2007, 22 US Congressmen wrote to the Honourable Susan C. Schwab, the United States Trade Representative, expressing their support for the Government Use of Patent regarding Efavirenz (Stocrin®)³².
- 16 February 2007, The Clinton Foundation, sent a letter of support for the Government Use of Patents in the antiretroviral drugs Kaletra® and Stocrin®.³³
- 17 January 2007, the Honourable Susan C. Schwab, the United States Trade Representative wrote to the Honourable Sander M. Levin, member of the United States Congress expressing that US Government will respect Thai Government decisions according TRIPS, in addition it was suggested that it would be appropriate to discuss with the direct stakeholders such as the patent holder. Hence, the Thai Government is very pleased to participate in this new round of negotiations³⁴
- 23 February 2007, the Third World Network sent a letter of support concerning the Government Use of Patents on the 3 drugs Kaletra®, Stocrin® and Plavix®.³⁵

The Thai Government is aware that this international support enhances its position when negotiating with Abbott and as such the outcome of negotiations could become more profitable for Thailand than expected before.

Despite this, the Thai Government said it was time set aside all negotiations³⁶ and that it would try to have a wider scope and very positive and collaborative behavior vis-à-vis Abbott and that it would expect from Abbott the same interest in achieving a successful agreement for both parties.

²⁹ Ibid. Document 23.

³⁰ The Ministry of Public Health and The National Health Security Office Thailand February. "Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand". *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Document 24.

³¹ Ibid, Document 26.

³² Ibid. Document 11.

³³ Ibid. Document 27.

³⁴ Ibid. Document 12.

³⁵ Ibid. Document 25.

³⁶ Ibid. Documents 16, 17 and 18.

*Scenario of the initial Abbott Laboratories' position:*³⁷

Abbott Laboratories declared that the company had a market share in Thailand that they wanted to preserve. Abbott's negotiators explained that as the Government Use of Patents was not for commercial use, in principle its market would not be affected. Nonetheless, Abbott considered that due to the infrastructure of the Thai healthcare system, the fact that their market would be affected or not was a controversial issue.

Abbott Laboratories stated that other pharmaceuticals companies, such as Bayer, have shown their support for Abbott's decision of slowing down the launch of new drugs in Thailand. Furthermore, Abbott expressed that in the long-term interest of the Thai people, it may be more fruitful to negotiate on a case by case with pharmaceutical companies in order to achieve solutions or options beneficial to all parties.³⁸

Abbott Laboratories expressed its discontent with the boycott campaign launched against them by many civil society groups. They stated that Abbott has the right to decide where to invest or launch new drugs, they justified the statement of an Abbott spokeswoman who recently declared that "if the Thai Government has decided not to support innovation by breaking the patents, Abbott will not submit applications or register new medicines and will withdraw current applications in Thailand until the government changes its position"³⁹ saying that the company was as well evaluating if the market size in Thailand would allow them to recover the investment required for those new drugs and make reasonable profits with the launching of those new drugs. In addition, Abbott expressed there was increasing uncertainty of how health markets would evolve in Thailand, calling up for instance the fact that the government declared that 15% of the patents drugs could be subjected to compulsory licensing in the future. Furthermore, considering that in those cases the pharmaceutical companies would be paid royalty fees of 0, 5% - 2% of the sale price, and in the case of Kaletra® of 0, 5 % of the total sale value,⁴⁰ Abbott stated that most probably the current health market would be affected. With these words Abbott wanted to transmit to the Thai Government that they were very disappointed about the Abbott boycott. And as well, they showed their concern over a very important point: royalty fees are a very low percentage of the sale price, thus, if the use of government patents were extended considerably, pharmaceuticals companies operating in Thailand would see their profits diminish together with their innovation and research incentives.

Moreover, the AIDS specialist scientists from the Abbott team negotiators expressed their concerns, that the government might have been focusing all its efforts on AIDS drugs to cover more population without investing as well in educational health policy for those people who live with AIDS, and that a whole plan was needed in order to better tackle the AIDS issue.

³⁷ I state firmly that the name of Abbott is used to exemplify the present simulation as such Abbott statements –when they are not quoted in the references- are imaginary and all similarity with reality is pure coincidence.

³⁸ The Nation. March 20th 2007.

http://www.nationmultimedia.com/2007/03/20/headlines/headlines_30029743.php

³⁹ Love, James. "Health: Abbott itself sought compulsory license, while criticising Thai license". TWN(Third World Network). 3 May 2007.

<http://www.twinside.org.sg/title2/health.info/twninfohealth087.htm>

⁴⁰ The Ministry of Public Health and The National Health Security Office Thailand February. "Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand". *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Pages 11 and 12.

Nonetheless, Abbott negotiators expressed that they were grateful for the opportunity to start formal negotiations and that they were highly motivated to collaborate with the Thai Government in order to achieve a new, mutually beneficial agreement.

This round of negotiations concluded on Wednesday, 25 April 2007, and a next round of negotiations was proposed for Monday, 7 May 2007 in order to allow both parties to analyse all the information gathered, and develop proposals and establish wishes and needs – always seeking constructive solutions and more according to the actual circumstances of the issue at stake.

POTENTIAL SOLUTIONS FOR HYPOTHESIZED SCENARIOS

The new round of negotiations began as scheduled on Monday May 7th 2007 and lasted two consecutive weeks, concluding successfully on 18 May 2007. Below is an evaluation of how this conclusion was possible.

Phase 3 - Edging closer

Following were the results of both parties once back at the negotiating table.

The Thai Government:

The Government stated that “Thailand, with a population of 62 million people has approximately more than one million people afflicted with HIV” and that “at the present about 500,000 are still alive and eventually need long term use of HIV antiretroviral drugs to maintain their productive lives.”⁴¹ Thailand has one of the highest levels of spending from national public resources on access to ARVs among the low-middle income developing countries. The budget supported by the Global Fund covers less than the 20% of Thai expenses on ARVs.⁴²

At present, the budget allocated for health services to people affected with the HIV as well as people already living with AIDS is limited to 3.86 billion Bath for a target group of 108,000 patients. Hence, the budget is insufficient for the State to acquire the drugs for distribution to all HIV infected people. Besides, in the future at least 50,000 of them will require second line treatment such as Kaletra® which is the combined formulation of Lopinavir and Ritonavir and has proven to be very effective for patients resistant to basic formulations of HIV antiretroviral drugs. Nonetheless, its higher price only allows the government to provide this treatment to 2,000 patients whereas with the Government Use of Patents the government could treat an additional 8,000 lives.⁴³

Considering this, it can be envisaged that the Thai Committee placed the increase of access to Kaletra® to more 8,000 patients as the Thai Government’s *reservation price*. Hence, they would not make any agreement if they were not able to treat this number of

⁴¹ The Ministry of Public Health and The National Health Security Office Thailand February. “Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand”. *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Page 41.

⁴² Ibid. page 2.

⁴³ The Ministry of Public Health and The National Health Security Office Thailand February. “Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand”. *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Document 6 and page 14.

patients. At the same time their *aspiration price* (i.e., what they would ideally wish to obtain from the negotiation) would be to gain sufficient access to essential drugs such as the antiretrovirals but also to other drugs on the essential drug list, as well as restore a good relationship with Abbott.

Abbott Laboratories:

Taking into consideration current international situations, such as the pending court case of *Novartis v. the Government of India*⁴⁴, Abbott established its *reservation price* at avoiding a court case against the Thai Government, being able to reach an agreement, ending the boycott against Abbott, and securing the right to produce generics or export them to Thailand for distribution through Abbott's own channels, at least for a certain period of time and at a determined reasonable price. Moreover, Abbott set its *aspiration price* at concluding negotiations in a satisfactory way, meaning that apart from the *reservation price*, for instance they could achieve contracts from the Thai Government to be major supplier of infant nutrition products and other health services in Thai public hospitals or in the 80 private hospitals that recently joined the Thai *Gold card or Universal Coverage scheme*.

Furthermore, they would be interested in achieving Thai and international recognition for their Corporate Social Responsibility (CSR) projects. In fact, Abbott has always shown a desire to be considered at the forefront amongst socially responsible pharmaceutical companies. For instance, in the 1970's, in the case of WHO/UNICEF code for milk substitutes, Abbott, in the beginning, did not want to join the International Council of Infant Food Industry (ICIFI) as Abbott disapproved the ICIFI code ethics proposed saying that ICIFI code was weaker than the Abbott code of marketing for milk substitutes at that time.⁴⁵ As well, nowadays, Abbott is developing numerous projects and initiatives to contribute to improve access to health care in several countries⁴⁶.

Through the negotiations Abbott mainly wanted to stress to the Thai Government that reaching an agreement with Abbott would be more beneficial to Thailand than simply having the cheapest generic drug version shipped from India or China. Thus, Abbott had planned to implement specific corporate social responsibility (CSR) oriented projects adapted to the Thai health situation. Abbott wanted to illustrate that it was a leading pharmaceutical company which invests significantly in research and innovation. Consequently, if a fruitful agreement was reached between the Thai Government and Abbott, that would facilitate in the future access to new drugs for the Thais that could be discovered and developed by Abbott.

Hence, the Abbott team of negotiators proposed several initiative and projects.

⁴⁴ Also related to patent rights where increasing international support is being shown in favor of India and access to essential drugs to people. Intellectual Property Watch. "Novartis Persists With Challenge To Indian Patent Law Despite Adversity" 19th October 2006. <http://www.ip-watch.org/weblog/index.php?p=430&res=1024&print=0>

⁴⁵ Sikkink, Kathryn. "Codes of conduct for transnational corporations: the case of the WHO/UNICEF code". *International Organization* 40,4. Autumn 1986. Page 826.

⁴⁶ <http://www.abbottfund.com/sections/what.html#b>
http://www.abbott.com/global/url/content/en_US/40.5:5/general_content/General_Content_00326.htm

- Hypothetical negotiations and the issues discussed:

First, the scientists amongst Abbott's negotiators expressed the need to enhance the supervision of patients living with AIDS and being treated with ARVs. In order to achieve that, they declared the intention to build a research center and expressed their wish that the research center could be made in cooperation with Thai institutions such as the GPO (the Government Pharmaceutical Organization)⁴⁷.

Furthermore, Abbott proclaimed that under a CSR program they would fund educational projects. Abbott felt it essential to extend educational efforts to enhance patients' compliance⁴⁸ with AIDS treatment among Thai patients and to avoid the spread of AIDS due for instance to the use of non-sterile needles or unprotected sexual relationships.

Scientists added that patients with high compliance levels have much lower risks of developing resistances to AIDS first line drugs and as such can be treated with a lower cost to the government. The Abbott team explained that ARV compliance should be superior to 95%⁴⁹ in order to enhance the effect of the drugs and to minimize the apparition of secondary effects as well as resistances to first line ARV drugs. Thus, avoiding or minimizing the use of second line treatments and their higher cost - compared to ARV first line treatments. Additionally under this AIDS treatment development plan, Abbott explained that they will develop two tests (the Haynes-Sackett test and the Morisky-Green test⁵⁰) that will enable them to analyze treatment compliance levels by AIDS patients in order to have the basis to act appropriately. It is important to note that Abbott's development of a CSR project that involves investing funds in an AIDS research centre and programmes, benefits that include providing patient case studies vis-à-vis ARVs, and usage information and data from Thai hospitals and other sanitary facilities. This could possibly enable Abbott to run ARV's drug tests according Thai laws in the future.

The Thai Committee was very pleased with the suggestion, and said that this initiative will cope with two very important issues: research and compliance in AIDS treatment. In addition, the Thai Committee said that the Abbott initiative would be made in cooperation with the public hospitals as well as with the new 80 private hospitals that recently joined the Thai *Gold card or Universal Coverage scheme* trying to target a bigger

⁴⁷ In 5 August 1966, the Government Pharmaceutical Organization (GPO) was officially established as a state enterprise under the Ministry of Public Health under the Government Pharmaceutical Organization Act, AD 1966 signed by her Royal Highness Princess Srinagarindra, the Princess Mother. Since then, the GPO has been merely contributing to the Thai society in providing better standing of living for all Thais through a production and supply of quality medicines at affordable prices. The GPO has never stopped developing itself to meet international standards proving to be the leading pharmaceutical manufacturer domestically and internationally. <http://inter.gpo.or.th/>

⁴⁸ When Abbott relates here to compliance they are referring to the definition of Haynes, which is the more agreed definition of compliance as it involves as well the concept of adherence to the treatment, including the monitoring of the pharmacologic treatment as well as all the instructions needed for the therapy like special diets or modifications in life habits for the patients.

Compliance definition of Haynes *et al.* (1979)

"The extent to what the behaviour of the patient, in taking the medication, following specific diets, or changing the required life habits harmonizes with the clinic prescription". Estrada, M. "Compliment o adherència". *Atenció Farmacèutica*. Col·legi de farmacèutics de la província de Barcelona. 2006. vol, 64 n. 3- p. 64-67.

⁴⁹ Estrada, M. "Compliment o adherència". *Atenció Farmacèutica*. Col·legi de farmacèutics de la província de Barcelona. 2006. vol, 64 n. 3- p. 64-67.

⁵⁰ Ibid.

number of people suffering AIDS. The Thai Committee also expressed their desire to be able to involve in these projects the Thai Rural Doctors Society who had been doing a sound work for years in Thailand to try to cope with the problem of inequitable distribution of Thai doctors⁵¹ and as such inequitable access to health care by the Thai population. Furthermore, the Thai Government added that they were sure that the GPO would be cooperative in such initiatives as since its creation the GPO had been deeply committed to the public health care system in Thailand.

The Abbott Committee was pleased with such a positive reaction to their initiative and added that they will ensure access to Lopinavir+Ritonavir for the Thai people, the same number – 10,000 – that the government was targeting by implementing the Compulsory Licensing (i.e., the current 2,000 people plus 8,000 people living with AIDS).

At this point, the Thai Committee was astonished, but then Abbott team added that there would be some conditionality.

The “generic drug” will be produced by Abbott in Thailand or exported to Thailand by Abbott or its subsidiaries. The Government will fix a period between 7 to 15 years where Abbott would be the exclusive manufacturer of the drug for Thai market. The selling price would be reasonable, meaning that it will take into account the different current generic prices of the same drug on the market and extract the average price for the generic.

All the above is to ensure that once the price is fixed by the Thai Government, Abbott will not have to lower more the price – unless Abbott considered appropriate to do so – during the period of time agreed by the Thai Government to grant Abbott exclusivity of this drug⁵². This would be respected even if in the years to come other companies could appear around the world offering cheaper prices – than the one fixed by the Thai Government at the moment of the negotiation – as for instance some generic pharmaceutical companies in India or China.

The drugs would be delivered under Abbott’s responsibility to the regional distribution centers and hospitals as indicated by the Thai government, but once delivered the drugs are not returnable, exchangeable or refundable. The Government must ensure that these drugs will be for public use, meaning that they will be distributed to patients under one of the three National Health Insurance schemes⁵³. At this point, the Thai Government agreed except on the price, where one member of the Committee said that if they were not to have the cheapest price, they would be losing at some point.

The Abbott team responded by explaining that negotiations with generic pharmaceutical companies that may not yet be present in Thailand could or could not be fruitful, and Abbott, already having a presence in the market, could ensure greater efficacy in the transport and delivery of the drugs through their usual delivery networks. Besides, the Abbott team argued that the government wanted to target 10,000 AIDS patients and that Abbott was ensuring that target.

⁵¹ Wibulpolprasert, Suwit & Pengpaibon, Paichit. “Integrated strategies to tackle the inequitable distribution of doctors in Thailand: four decades of experience”. Human Resources for Health. November 2003; 1: 12.
<http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=317381&blobtype=pdf>

⁵² In this scenario the period suggested to the Thai Government by Abbott laboratory has been between 7 to 15 years.

⁵³ The Civil Servant Medical Benefit Scheme (CSMBS), the Social Security Scheme (SSS) and the Gold card scheme (Universal Coverage).

Furthermore, Abbott emphasized again that if an agreement was reached between the Thai Government and them, Abbott would significantly contribute through their CSR projects to improve compliance in AIDS treatment for Thai patients and that will benefit as well the monitoring of incidence of AIDS in Thailand which is also a very important issue in order to contend with AIDS in a more all-embracing way. Besides, Abbott added that their laboratory will always be in head of research and as such potential new drugs would be developed for the treatment of AIDS. As such, an agreement with the Thai Government and Abbott would always facilitate Thai access to those medicines. Abbott also added that they would as well continue with the procedures required to launch their drugs Brufen®, Abbotic®, Clivarine®, Humira®, Traka®, Zemplar® and Aluvia® (the new formulation of Kaletra®) in the Thai market.

Here, there was unanimous agreement of the Thai Committee.

The Abbott team added that Abbott would guarantee the access to Lopinavir+Ritonavir to more patients – all the patients that could be in need over the years' term of Abbott exclusivity agreed by the Thai government⁵⁴ - not to exceed the 250,000 patients entitled for such treatment under the National Health Security System Act. They noted that this was the ceiling number that the Director General of Department of Control Disease stated in his last report⁵⁵.

At this point, the Thai Committee couldn't believe what they were hearing. Hence, they asked why Abbott would increase the quantity of drugs provided.

The Abbott team answered that Abbott was willing to provide drugs in order to contribute to better cope with AIDS pandemic but that there was one more important point to be discussed. Abbott declared that the drugs would be provided at the generic price to patients who demonstrated high levels of compliance determined through the compliance and adherence testing program to be established by the aforementioned research center in collaboration with Thai institutions. Abbott explained that AIDS should be tackled with a wide strategy focusing on access of drugs as well as on avoiding the spread of the disease, and trying, when possible, to avoid the creation of resistances.

Here there was a big silence. But after a while, the Thai Committee saw this as a fair proposal and accepted that Abbott linked access to compliance.⁵⁶ As the Thai Committee was aware that AIDS has been significantly spreading in Thailand, and as such, not only more ARV drugs were needed, but also a more wide and coordinated approach to deal with AIDS would be for sure beneficial to improve the health of Thai people.

The Abbott team expressed another big concern, for them the compulsory licensing under TRIPS was a very complex issue and although it fulfills all WTO requirements, Abbott would strongly recommend the creation of an international independent agency that will report and keep information on the design and implementation of all international intellectual property policies.⁵⁷ They also noted that the international community strongly supports generics in ARV's but that some countries were issuing compulsory licenses not only for ARVs, thus they restated the need of monitoring the government use of patents.

⁵⁴ In our scenario this period was suggested by Abbott to be between 7 to 15 years

⁵⁵ The Ministry of Public Health and The National Health Security Office Thailand February. "Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand". *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Page 43.

⁵⁶ Saner, Raymond. *The Expert Negotiator*. Chapter 4.

⁵⁷ Similar to Intellectual Property Watch but with more delegated powers.

For instance, Abbott said that the Thai Government had issued on 25 January 2007 a compulsory license on Clopidogrel (Plavix®) declaring that “Myocardial ischemia and cerebro-vascular accident are the most serious public health burden because of high mortality and disability loss.” and “Clopidogrel or the trade name in Thailand namely Plavix® has evidence based effectiveness for prevention of myocardial ischemia, cerebro-vascular accident and coronary stent implantation by inhibition of platelet aggregation. However, the medicine is expensive thus has hindered their accessibility.”⁵⁸

Next, Abbott added that a 2006 publication from the *Disease control priorities in developing countries* declares that “When compared with aspirin, Clopidogrel has a slight benefit among those who have had a previous stroke, myocardial infarction, or symptomatic peripheral arterial disease. Clopidogrel is an effective and safe alternative for patients who do not tolerate aspirin. Although Clopidogrel may be slightly more effective than aspirin, it is also more expensive.”⁵⁹

Abbott expressed that as such, the creation of an international independent body that would monitor and advise on the issuing of compulsory licenses could maximize the extent of international agreement of what drugs are considered to be essential. Abbott stated that all the new developed drugs, even if they have similar therapeutic uses than the existing ones, at the beginning they are more expensive than the latter⁶⁰. Thus, deep cooperation between different stakeholders at a national and international level would help to reach wider agreements when determining the best alternatives of treatment, taking into account cost and efficiency in order to maximize access to health care with the existing limited resources that low-income and low-middle income developing countries face.

Furthermore, Abbott suggested that this organization could work as an independent third party and be present in negotiations such as the ones currently underway, as a mediator.⁶¹

⁵⁸ The Ministry of Public Health and The National Health Security Office Thailand February. “Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand”. *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Document 7.

⁵⁹ Vijay Chandra, Rajesh Pandav, Ramanan Laxminarayan, Caroline Tanner, Bala Manyam, Sadanand Rajkumar, Donald Silberberg, Carol Brayne, Jeffrey Chow, Susan Herman, Fleur Hourihan, Scott Kasner, Luis Morillo, Adesola Ogunniyi, William Theodore, and Zhen Xin Zhang. “Neurological disorders”. *Disease Control Priorities related to mental, neurological, developmental and substance abuse disorders*. WHO Library Cataloguing-in-Publication Data. Publication reproducing five chapters from the Disease control priorities in developing countries, second edition, a copublication of Oxford University Press and The World Bank and co-produced by the Disease Control Priorities Project. 2006. Chapter 2; page 28. http://whqlibdoc.who.int/publications/2006/924156332X_eng.pdf

⁶⁰ It is important to note that laboratories are always discovering and developing new drugs that in principle are more effective than the existing ones. But this is only proved after some years of existence of those drugs in the market; the called Phase IV trials. “Phase IV trials involve the post-launch safety surveillance and ongoing technical support of a drug. Post-launch safety surveillance is designed to detect any rare or long-term adverse effects over a much larger patient population and timescale than was possible during the initial clinical trials. Such adverse effects detected by Phase IV trials may result in the withdrawal or restriction of a drug – recent examples include cerivastatin (Baycol® and Lipobay®), troglitazone (Rezulin®) and rofecoxib (Vioxx®).” Wikipedia. Phase IV of Clinical Trial. http://en.wikipedia.org/wiki/Clinical_trial

⁶¹ Saner, Raymond. *The Expert Negotiator*. Chapter: 4.

The Thai Government agreed to the creation of such agency but only if this agency would work in cooperation with WHO, and that a member of WHO also be present in all negotiations relating drug patent rights. The Thai Committee added that if there was a health issue and more parties were meant to be involved they wanted WHO supervise as well.

Abbott said that WHO involvement and monitoring was essential as well for monitoring the impact of the treatment. Abbott expressed that the motivation to develop the Thai AIDS CSR project were also an acknowledgement of the fact that if AIDS drugs are given to AIDS patients without proper education, AIDS could spread widely.

Hence, Abbott suggested to the Thai Government that the involvement in such activities of NGO's such as MSF⁶² - who has been working in Thailand since 1983 - would also be desirable in order to establish a well-built Thai work group in collaboration with WHO to monitor the incidence of AIDS in Thailand, and its evolution over the years. In addition, Abbott recognized the firm work of MSF in HIV-AIDS projects in Thailand.

Moreover, the Abbott team expressed that it was the entire world's concern to work for a wide and coherent plan against AIDS, and that if the apparition of resistances was not diminished soon, second and third generation drugs will be even more frequently needed, implying an enormous need of funds to be allocated to research and innovation. Hence, Abbott put forth the fact that when the Government Use of Patents is used with the little amount that involves the royalty fees, innovation and research are not fostered and as such, agreed with the Thai Government, that new forms of incentives should be developed with the international support.

The Thai Government concurred with Abbott team.

Moreover, the Abbott team applauded the move of the Thai health system from a fee-for-services system with retrospective reimbursement (at the present covering only 5 million people) to the capitation contracts system⁶³.

A capitation contract system allows the government to better control the costs; in fact at the present it covers 57 million of people and thus has allowed the Thai Government to move towards universal coverage. The Abbott team added that they would be happy to cooperate with the government by providing some other drugs from *the essential drugs list* at a lower price if the Government agreed to contract other Abbott products and health services for their regional centres, and private and public hospitals. The Thai Committee said that they would discuss the proposal with the Minister of Health but that they could ensure that based on this new relationship established, more fruitful negotiations could be expected between the Thai Government and Abbott.

To conclude, the Abbott team stated that they would respect further decisions of the Thai government concerning the drug patent rights.

At this point, the Thai Committee reassured the Abbott team that there would always be room to negotiation prior to taking any other decisions impacting their patented drugs; and that they expect any future negotiations to be as fruitful as the present ones.

⁶²In fact MSF has among their 128 people Thai team 33 employees from the Thai Ministry of Health getting a bonus for working with MSF. <http://www.msf.fr/thailande>

⁶³Wibulpholprasert, Suwit; Tangcharoensathien, Viroj; Nitayaramphong, Sanguan. "Knowledge-based changes to health systems: the Thai experience in policy development". Bulletin of the World Health Organization. October 2004, 82 (10).

Phase 4 – Conclusion or Breakdown

In the hypothesized scenarios it was imagined that in the last meeting between the Thai government and the Abbott laboratories held 17 May 2007, as promised, certain members of civil society were present such as MSF and some consumer groups, as well as the Thai Rural Doctors society and the GPO. Both parties, the Thai Government and Abbott acknowledged the fact that MSF and Thai Rural Doctors society perform very significant health roles specially deploying efforts to deal with AIDS and that their collaboration would make CSR AIDS projects overall more beneficial to Thai population. As such, the presence of these actors in the last meeting between the Thai Government and Abbott was essential in order to allow the Thai Government as well as Abbott to communicate to these actors the outcome of the negotiations as well as to clarify any points that could not be clear enough, in order to successfully try to involve them in the CSR projects. Moreover, both parties wanted representatives from the consumer groups to be there, in order to enable them to spread out the information of how negotiations have evolved in a way that the Thai Healthcare system will be able to attain fully their objectives of access to essential drugs for Thai population in relation to AIDS. Besides, the presence of consumer groups was important in order to secure their collaboration in the ending of the Abbottboycott.

Representatives from the GPO were also present and saw the offer of Abbott as a way of having access to more resources to deal with the high complex Thai health care situation. Thus, the GPO acknowledged that they would like to hold further meetings with the Abbott people in charge of the CSR projects in order to build up a foundation to cooperative effectively.

CONCLUSION: THE FINAL AGREEMENT AND ITS IMPLICATIONS

It was concurred that Abbott Laboratories Ltd. will be responsible for providing Lopinavir+Ritonavir to the Thai Public Health System over 10 years⁶⁴ at a “reasonable generic price.” Additional drugs will be provided upon favourable compliance reports from the Thai work group on AIDS and the Research Centre, in order to reach the initial target number of 10,000 AIDS patients. More drugs will be provided if needed until the maximum target of 250,000 people living with AIDS in Thailand and entitled to be covered under the National Health Security System Act⁶⁵.

The Thai Government and Abbott will strive to convince other governments and pharmaceutical companies to engage in constructive negotiations and they propose the creation of an independent agency, which will report on TRIPS-drug patent rights to the international community and will also serve as a mediator in such negotiations.

Furthermore, due to the fruitful outcome of the negotiations and the subsequent contentment from consumer groups of AIDS living patients and NGO’s such as the MSF, the Abbott boycott was dismantled.

⁶⁴ In fact in our hypothetical scenario Abbott offered the Thai Government to choose between a period of 7 to 15 years. Thus, in our scenario we imagine that the Thai Government chooses the intermediate period of 10 years.

⁶⁵ The Ministry of Public Health and The National Health Security Office Thailand February. “Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand”. *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Page 43.

Besides, the NGO MSF, the GPO and the Thai Rural Doctors society officially communicated their intentions to cooperate with CSR Abbott projects. Furthermore, they declared to engage in transmitting their broad experience and in-situ knowledge of the Thai Health situation after many years of working for the Thai public health care system, in order to foster the success of those projects as well as to improve the quality of life for people living with HIV/AIDS.

As expected, Abbott explained that their cooperation will be essential to make those projects more efficient and to enlarge their scope; and the Thai Government expressed that the community involvement would without any doubt benefit the outcome of all the health initiatives that could be taken under this CSR Abbott project.

A representative from the Bill Clinton Foundation, which had already supported the Thai initiative on the Government Use of Patents, agreed that these negotiations represented a new way of dealing with such complex matters, resulting in a satisfactory outcome for both parties. It added that The Bill Clinton Foundation will provide funds establishing a program focused to enable access to AIDS treatment to all pregnant women with HIV/AIDS⁶⁶ in order to allow them to give birth to healthy children not carrying the HIV.

A report explaining the outcome of the negotiations between the Thai Government and Abbott Laboratories was provided to the media. There were subsequent supportive articles and editorials in the local newspapers as well as in some international press. The Minister of Public Health strengthened his position as the most appreciated minister of the new government,⁶⁷ and Abbott Laboratories was seen as a leading socially responsible pharmaceutical company.

To conclude, a new way of fruitful relationships according to the current needs of coping with AIDS was born. Both parties agreed for the need to search for a way to create new incentives to innovate and research for AIDS and health.

The official signature of the new agreement took place on 18 May 2007 at the Ministry of Health in a friendly atmosphere full of hope for the future.

⁶⁶ McNeil Jr., Donald G. "Cheap AIDS drug is safe for pregnant women, study says" International Herald Tribune. January 11, 2007. <http://www.iht.com/articles/2007/01/11/news/aids.php>

⁶⁷ According a public poll from the National Statistical Office in February 2007, the Minister of Public Health after the decision to implement the Government Use of Patents was voted as the top appreciated ministry of the new Thai government. The Ministry of Public Health and The National Health Security Office Thailand February. "Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand". *Document to Support Strengthening of Social Wisdom on the Issue of Drug Patent*. Page 21.

Final remark

I believe a real way of coping with the issue of Government Use of Patents under TRIPS will need long and complex real negotiations involving many stakeholders, and as such are out of the scope of this modest paper. Besides, I do believe that “ Union makes the strength” as such if private sector, public sector and NGO’s could reach agreements to collaborate among others, that would for sure create synergies that would benefit all parts.

All data has been collected through internet and it is quoted and referenced in the bibliography, it has served to be able to create an imaginary scenario in relation with reality. I apologize for any misunderstanding of the data collected via internet and I state that the aim of this paper is to apply the Integrative bargaining theory in the framework of the class of “Management of Organizational and Institutional Conflicts”.

Thus, all Abbott, Thai Government, Clinton Foundation and other NGOs or stakeholders’ statements and positions – which are not quoted in the references - are not real and only part of this scenario. Any similarity of this scenario with reality is coincidence.

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PART II: MALIGNANT MILITARY CONFLICTS

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INTERNATIONAL DONORS SEEK ALTERNATIVES TO PROVIDING AID & FINANCIAL SUPPORT TO THE HAMAS-LED PALESTINIAN AUTHORITY: US FAVORS MODIFICATION OF UNRWA'S ROLE TO PROVIDE AID & SERVICES TO ALL PALESTINIANS

Mohalhel Fakh

ABSTRACT

This chapter examines the current crisis of providing international aid and financial support to the Palestinians whose communities in the West Bank, the Gaza Strip and East Jerusalem face the specter of socio-economic collapse following the victory of Hamas in January 2006 elections. It analyzes proposals by the United States and the European Union to divert the aid that the international community provides to the Palestinian Authority from the Hamas-run government to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). This proposal would inevitably require changing the mandate of UNRWA, which was created in 1949 as a unique organization to contribute to the welfare and human development of Palestinian refugees in the Palestinian territories and host countries in the Middle East. The chapter provides a brief background on each of the stakeholders in this crisis and their current position on the US-led proposal. A methodological study on the expected negotiating strategy and tactics of each of the main parties to this crisis – Hamas, the United States, and UNRWA – is examined, followed by an exercise of the different possible scenarios and outcomes of this negotiating process and crisis, based on Thierry Senechal's methodology, Shell Global Scenarios, and Systems Dynamics theories. An annex includes relevant facts and figures.

THE CONFLICT

Concerns about Peace Process Under a Hamas-led Government Deepen Crisis in the Palestinian Territories and Put UN Agency in Limelight.

The victory of Hamas in the Palestinian legislative elections earlier this year, and the subsequent formation of a Hamas-led Palestinian Authority government has alarmed Western governments. They face the dilemma of not wanting to deal with a government that refuses to recognize Israel and rejects the Middle East peace process, but at the same time they want to avoid an economic meltdown in the already impoverished and violence-ridden Palestinian territories. The General Assembly mandate of the United Nations Relief and Works Agency (UNRWA) limits its activities to supporting Palestinian refugees inside the Palestinian territories and in Arab host countries. The United States and the European Union increasingly favor a modification of UNRWA's role so that it can provide services to the Palestinians and be used to channel aid to the Palestinian territories. The US-led proposal to modify UNRWA's role could lead to the division of the agency into separate geographic departments offering support to refugees in host countries, with a separate unit

in the Palestinian territories providing some of the services that the Palestinian Authority used to supply. This will require a flurry of diplomacy and arduous multilateral and multi-institutional negotiations since it involves a multitude of institutions, governments, and stakeholders, each with its own interests, concerns and views.

KEY DEVELOPMENTS RELATED TO THE CRISIS

The US and the European Union avoid contact with Hamas.¹ The US refuses to fund projects run by the group, which means Western aid is not reaching the Palestinians.² Dwindling aid is taking its toll, but is strengthening Hamas because of a nationalist reaction against what is perceived as foreign interference.³ To add to an already tense atmosphere, members of the rival Hamas and Fatah groups have engaged in violent clashes, resulting in deaths and in the most serious inter-Palestinian fighting since Hamas defeated rival Fatah in the January 2006 election.⁴

Following Hama's victory, Israel had stopped transferring some US\$55 million in monthly tariff returns it collects on behalf of the Palestinians (and temporarily cut off gas supplies to the territories).⁵ However it now agreed to release the money, and senior officials from the rival Hamas and Fatah drafted a platform to work together, including an acceptance of a Palestinian state existing alongside Israel, which could mean a tacit Hamas recognition of Israel.⁶ Uncertainty remains over how Palestinian factions based outside the territories – and how governments like Iran and Syria, with major influence on the Palestinian Authority – will react. International negotiators of the so-called Middle East Quartet – the UN, the US, the EU and Russia – agreed at a meeting in New York on 10 May 2006 to create a special fund to provide aid and financial support to the Palestinians,⁷ but the US remains cautious about the possibility of funds ending up with members of Hamas who occupy official posts. Since September 2000, the Palestinian economy has experienced a destruction of its infrastructure, the collapse of its domestic revenue, a GDP drop by more than a quarter in 2002, unemployment reaching more than 40%, and more than 60% of the population living below the poverty line of \$2 per day.⁸

MAIN STAKEHOLDERS

United Nations Relief & Works Agency (UNRWA)

History of UNRWA

UNRWA is the largest UN operation in the Middle East. It has more than 25,000 staff members and operates in the Gaza Strip, the West Bank, Jordan, Lebanon and Syria.⁹ The

¹ The International Crisis Group. Available at: <http://www.crisisgroup.org/text/index.cfm?id=3886>

² Ibid.

³ Ibid.

⁴ Reuters May 8, 2006. Gaza City.

⁵ Teibel, Amy. Associated Press report. Jerusalem. May 11, 2006.

⁶ Ibid.

⁷ Ibid.

⁸ "European Commission Technical Assistance Office for the West Bank & Gaza Strip" Europa website: <http://www.delwbg.cec.eu.int/>

⁹ http://www.house.gov/apps/list/press/ny17_engel/pr111704.html

United Nations Relief and Works Agency for Palestine in the Near East, was organised in 1948, when the Arab-Israeli conflict began.¹⁰ UN General Assembly Resolution 302 established UNRWA to provide direct relief and works programs for Palestine refugees. The General Assembly extended UNRWA's mandate until 2008. The Agency is led by a Commissioner-General, who is appointed by the UN Secretary-General in consultation with an Advisory Commission. The Commissioner-General's position is unique because he reports to the General Assembly. UNRWA's Advisory Committee, made up of several countries, reviews the agency's activities.

Facts and Figures about UNRWA

UNRWA serves refugees "who number(ed) 4.1 million in 2004."¹¹ Many refugees are not registered, and reside outside UNRWA's area of operations and services. Thirty-two percent of the refugees live in camps (*see Tables 1-4 and Figure 1*).

Most of UNRWA's employees are Palestinian refugees.¹² Its headquarters are divided between Gaza and Amman, but it has offices in the Jordanian capital, Beirut, Damascus, Jerusalem, and Gaza.¹³ Financial difficulties have forced UNRWA to provide food rations only to the refugees most in need¹⁴ and a debilitating crunch of US\$31 million was covered by the European Union at the last minute in 2001.¹⁵ (*See Figure 3*).

UNRWA's 2005-2009 Medium Term Plan aims at tackling the problems that face the "most vulnerable Palestinians", help the refugees "maximize" their economic potential, and build the Agency's capacity. It costs \$1.1 billion, and was developed in tandem with the Palestinian Authority's Medium Term Plan (before Hamas formed the current government). UNRWA argues that its services are needed for stability,¹⁶ and has confirmed that it will continue to provide assistance to the refugees and will work with Hamas to address humanitarian needs.¹⁷ (*See Finance Sheet I and Figure 8*).

The changing role of UNRWA and the status of refugees

Since 1967, UNRWA has been caught between "occupiers and occupied." It should cooperate with the Israeli government which is perceived as hostile by the refugees, and which can hamper the Agency's operations or even expel it, while at the same time it is mandated to carry out a specific mission by the General Assembly.¹⁸ The Agency has a

¹⁰ Information provided in this section, unless otherwise stated, was obtained from UNRWA's official website. Available at: www.unrwa.org

¹¹ Ibid.

¹² Information in this section, unless otherwise stated, was obtained from the Agency's website. Available at: www.unrwa.org

¹³ UNRWA Overview: UN website: www.un.org/unrwa/overview/qa.html

¹⁴ UNRWA's official website.

¹⁵ Ibid.

¹⁶ UNRWA Press Release. "UNRWA Faces \$31 Million Budget Crisis." Amman, Jordan. September 24, 2001.

Available at: <http://www.unis.unvienna.org/unis/pressrels/2001/pal1893.html>

¹⁷ Jerusalem Post. April 12, 2006.

¹⁸ Schiff, Benjamin. "Between Occupier and Occupied: UNRWA in the West Bank and the Gaza Strip." *Journal of Palestine Studies*: Volume 18, No.3.

status within the UN that allows it some political role. It regulates contacts with host governments, and its field directors coordinate activities with host authorities.¹⁹

The task of UNRWA was re-defined in a 1988 report by the Secretary General as that of “general assistance” protection for refugees rather than its traditional humanitarian role.²⁰ He also strengthened its role by reinvigorating its programs and increasing its personnel.²¹ UNRWA’s added responsibilities during the first *intifada* reflected dynamism and political relevance.²² Its services covered non-refugees, with the approval of the General Assembly.²³

Today, UNRWA works closely with other UN agencies including the WHO, UNESCO, the UN Special Coordinator for the Middle East Peace Process, and NGOs.²⁴ Its Commissioner-General is accountable to the General Assembly and is authorized to report directly and independently to it.²⁵ General Assembly Resolution 194, which calls for the return of refugees or their compensation, largely controls UNRWA’s fate.

The status of Palestinian refugees is unique under international refugee law. They receive special treatment, which some states and groups argue severely restricts their rights.²⁶ They are outside the mandate of United Nations High Commissioner for Refugee protection and the Refugee Convention (UNHCR).²⁷ This means they do not qualify for the Convention’s guarantees in Arab states, in terms of absorption and citizenship.²⁸ They are also ineligible for permanent resettlement as refugees or asylum seekers in other countries.²⁹ The International Court of Justice’s recognition that the UN (through the UNHCR) has the capacity to file a claim against a state to obtain repatriation for damage, does not apply to Palestinian refugees.³⁰ For a brief period, UNRWA was present in peace negotiations with Israel, but Israel protested that presence.³¹ A proposal has been raised by some scholars for refugees to choose separate bodies to represent them.³² But a change in UNRWA’s mandate will open the door, at the General Assembly, for the politicization of sensitive issues in the Israeli-Palestinian peace process.³³ It will also imply a modification in UNRWA’s capacity and budget.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ The request came from General Assembly because the Secretary General’s mandate regarding UNRWA is to help establish financial, administrative, and budgetary measures. Available at: <http://www.un.org/unrwa/overview/qa.html#up>

²⁴ UNRWA Overview: UN website

²⁵ www.unrwa.org

²⁶ Akram, Susan. “Reinterpreting Palestinian Refugee Rights Under International Law, and a Framework for Durable Solutions.” Boston University School of Law. Available at: <http://www.badil.org/Publications/Briefs/Brief-No-01.htm>

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Brynen, Rex. “The Future of UNRWA: An Agenda for Policy Research.” McGill University. Palestinian Refugee ResearchNet. Available at: <http://www.arts.mcgill.ca/mepp/prrn/papers/future.html>

USA

*US role in the Middle East and positions on UNRWA and Hamas*³⁴

The United States hails UNRWA for its management reform, and describes its programs as a force of stability in the region, but it rejects some General Assembly resolutions that it views as over-stepping UNRWA's humanitarian concerns.³⁵ The US has been the largest single-nation contributor to UNRWA, and second to the European Community in terms of total funds. The US contributed US\$84.15 million to UNRWA in 2006, with a proposed US\$51 million to be provided for the Agency's emergency appeal.³⁶ Since the *intifada* of 2000, the US has contributed US\$186 million to UNRWA's emergency appeal.³⁷ Half of the aid is spent on refugees in the West Bank and Gaza to promote self-sufficiency and to "prepare the refugee population for independent statehood in keeping with the President's vision of two democratic states – Israel and Palestine – living side-by-side in peace and security."³⁸

In April, the US announced the suspension of financial assistance to the Hamas-led Palestinian government.³⁹ At the same time, the US pledged to increase its humanitarian aid to the Palestinian people through UNRWA and other (NGOs) thanks to UNRWA's presence on the ground and its record of accountability.⁴⁰ The American government already froze aid to the Palestinian Authority and barred US officials from dealing with the Hamas government.⁴¹ American officials said UN staff could conduct "official business" with the Palestinian Authority.⁴²

*American influence in the United Nations*⁴³

The United States is the most significant contributor to the UN.⁴⁴ In 2002, for example, it provided the UN with more than US\$3 billion, funding about 22% of the UN budget. It also provides voluntary contributions.

The US supports UN reform. Many American officials are critics of the large bureaucratic machine. Leading American media were also critical of Secretary General Kofi Annan for his son's implication in corruption linked to the Iraq Oil-for-Food scandal under the former Baath regime.⁴⁵ Critics of the US argue that Washington plays a large role

³⁴ Details on divergent US government branches views on UNRWA are included under a different section.

³⁵ Statement by Walid Maalouf, Senior Adviser, on Agenda Item 83: UNRWA. October 30, 2003: http://www.un.int/usa/03_212.htm

³⁶ US State Department International Information Program. April 10, 2006. Available at: <http://usinfo.state.gov/utills/printpage.html>

³⁷ Ibid.

³⁸ Ibid.

³⁹ <http://usinfo.state.gov/mena/Archive/2006/Apr/07-913086.html>

⁴⁰ Ibid.

⁴¹ Reuters: "American head of UN agency meets Hamas official." 17 April 2005.

⁴² Ibid.

⁴³ Details of pressure to shut down some UN agencies are in a different section.

⁴⁴ <http://www.state.gov/r/pa/ei/rls/24236.htm>

⁴⁵ Deen, Thalif. "Is Beleaguered UN Chief Caving In to US Pressure?" Inter Press Service. 10 February 2005. Available at: <http://www.globalpolicy.org/secgen/annan/2005/0210belun.htm>

in UN matters, citing Annan's appointment of President George W. Bush's supporter Anna Veneman as head of UNICEF.⁴⁶ They also point to his refusal to reappoint Commissioner-General of UNRWA Peter Hansen,⁴⁷ a long time critic of Israeli closures and operations.

Some of the most recent American activities in the UN include calls for establishing the Democracy Fund,⁴⁸ and the creation of the Human Rights Council this year, after its predecessor, the Commission on Human Rights, came under strong American criticism for admitting dictatorships to its board.⁴⁹ Still, the US did not join the Council, awaiting its performance. American Ambassador to the UN John Bolton said, "The key, of course, is to tailor policies and UN activities to particular problems in the most efficient and effective way possible."⁵⁰

Israel's alliance with the United States and its relations with UNRWA ⁵¹

Israel's Ambassador to the US, Danny Ayalon, confirmed his country's support for imposing broad sanctions against the Palestinian Authority, and described as "entirely inaccurate" reports that Israel opposed an anti-Hamas legislation circulating in Congress.⁵² Israeli Prime Minister Ehud Olmert is expected to thank both houses of Congress in Washington this month for blocking aid to the Palestinian Authority.⁵³ Israel has asked UNRWA to expand its program in the West Bank and Gaza to non-refugees. Last year it threatened to halt UNRWA's operations in Gaza.⁵⁴ Expanding UNRWA's operations could constitute an alternative to dealing with Hamas. UNRWA's Commissioner-General, Karen Koning AbuZayd, confirmed that the agency is conducting "contingency planning" for such possibilities.⁵⁵ She raised concerns about the capacity of UNRWA, but added it "can be done."

Relations between Israel and UNRWA are based on a 1967 agreement allowing the agency to operate in Palestinian territories.⁵⁶ UNRWA deals with Israel's "civil administration" in the occupied territories, and if needed with Israel's Foreign Ministry. Violations are reported to the General Assembly, including when its local staff is detained.⁵⁷ UNRWA is under the control of neither the Israelis nor the refugees, therefore it is a convenient target of criticism on both sides.⁵⁸ Israel prefers not to involve UN agencies in issues related to the peace process, due to its perception that UN participation

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Statement of US Permanent Representative to the United Nations John R. Bolton. "Challenges and Opportunities in Moving Ahead on UN Reform Hearing before the Senate Foreign Relations Committee." October 18, 2005. Washington, DC.

⁴⁹ Pisik, Betsy. May 9, 2006. "Revamped set on members of UN human rights body." Washington Times.

⁵⁰ Ibid.

⁵¹ Israel's inclusion in this section is in line with grouping major stakeholders and their closest allies in this exercise.

⁵² Nathan, Guttman. Jerusalem Post. May 11, 2006.

⁵³ Ibid.

⁵⁴ Reuters news agency. Report from Jerusalem. March 31, 2006.

⁵⁵ Ibid.

⁵⁶ Schiff, Benjamin. "Between Occupier and Occupied: UNRWA in the West Bank and the Gaza Strip." Journal of Palestine Studies: Volume 18, No.3.

⁵⁷ Ibid.

⁵⁸ Ibid.

upholds the refugee issue in an international setting, which Israel views as unsympathetic.⁵⁹ Israel would like to see an early termination of UNRWA's role (as soon as a solution is reached) because it is a symbolic representation of the refugee problem.⁶⁰

The European Union

EU support of UNRWA and coordination with the United States

The European Union is part of the Middle East Quartet (US, EU, UN, and Russia). It provides political, financial and human resources support to the Quartet Special Envoy for Disengagement.⁶¹ The EU supports the creation of a Palestinian state as a prerequisite for solving the refugee problem.⁶² Its stance on the peace process and refugees is based on the Madrid peace conference, the Oslo Accords, and the legal principles of Security Council Resolutions 242 and 338.⁶³ The EU has provided aid of about US\$6 billion, in addition to almost the same amount in loans, to contribute to the creation of a Palestinian state. It took part in the multilateral Refugee Working Group of 1992.⁶⁴

The EU exerted efforts towards the establishment of a state in the framework of the Euro-Mediterranean Partnership of 1995, and signed an interim trade accord with the Palestinian Authority.⁶⁵ Since 1991, the post of EU Special Envoy to the Middle East Peace Process helped Europe play an important role in the region. Europe has not committed to supporting the refugees' 'right of return' or compensation in line with General Assembly Resolution 194. It remains focused on providing support to refugees through UNRWA and the European Commission Humanitarian office (ECHO).⁶⁶ Palestinians perceive the EU as a counterweight to US-Israeli coordination.⁶⁷

EU assistance to the Palestinians began in 1971 through UNRWA,⁶⁸ but now the EU attaches reform conditions to contributions.⁶⁹ It committed 250 million euro in grants between 1994-1998, in addition to loans. By 1998, the EC pledges exceeded 400 million euros for the 1999-2003 period.⁷⁰ Between 1994 and 2002, the EU committed about 1 billion euro in grants and loans, and another 500 million euro in contributions to UNRWA. In the same period, EU member nations' assistance stood at around 2.5 billion euro.⁷¹ The

⁵⁹ Brynen, Rex. "The Future of UNRWA: An Agenda for Policy Research." McGill University. Palestinian Refugee ResearchNet.

Available at: <http://www.arts.mcgill.ca/mepp/prn/papers/future.html>

⁶⁰ Ibid.

⁶¹ http://ec.europa.eu/comm/external_relations/mepp/

⁶² Dumper, Mick. University of Exeter, UK. "An EU Study on the Return and Re-integration of Palestinian Refugees and Displaced Persons." Presented at the Stocktaking Conference on Palestinian Refugee Research in Ottawa, Canada, June 17, 2003.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ "European Commission Technical Assistance Office for the West Bank & Gaza Strip." Europa webiste: www.delwbg.cec.eu.in

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

EC Technical Assistance Office to the West Bank and Gaza Strip also implements some donor assistance to the Palestinians.⁷²

Between 2002 and 2005 the EU contribution to UNRWA totaled 237 million euro. In 2005, EU aid represented 21% of UNRWA's total budget of 303.5 million euro.⁷³ A 2001 study conducted for the EU said if the European Union is committed to supporting the resolution of the refugee problem, it would have to fund the transformation of UNRWA.⁷⁴

Hamas

Hamas is the main Islamist movement in the Palestinian territories.⁷⁵ It was formed after the 1987 *intifada*. It opposes the Oslo peace process, and does not recognize Israel. The organization has a grass roots following with a military and a political wing. It has been a provider of social services to Palestinians in the West Bank and Gaza. Its military wing, the Izzedine al-Qassam, has claimed responsibility for violent attacks against Israel. Hamas had previously refused to recognize the Palestinian Authority as the only legitimate official government body in Palestinian territory. Hamas is now maintaining a cease-fire with Israel but refuses to renounce the armed struggle.⁷⁶

Hamas's election victory took the world by surprise, but there had been signs of 'deep dissatisfaction' with Fatah over corruption and the absence of progress towards realizing the goal of independence.⁷⁷ Palestinians voted for Hamas because of its 'perceived discipline and integrity,' and its 'strong anti-Israeli ideology.'⁷⁸ Currently, Hamas has to deal with difficult circumstances and a breakdown in Palestinian order. It also has to make clear its vision for the Palestinians and their future relation with Israel, which wants the group's military wing disarmed. One of the main features of Hamas is that it is led by a 'covert system' that was created 'in response to Israel's assassination of several of its top leaders;' some Hamas leaders now live in Syria and Lebanon.⁷⁹ Current Prime Minister, Ismail Haniya, is considered a moderate.⁸⁰ Despite Hamas's victory, the presidency of Mahmoud Abbas (elected for four years in 2005) is intact; but the 'powerful mandate for Hamas' will diminish his authority.⁸¹ Israel has called Hamas part of an "axis of terror" with Iran and Syria, along with Hizbollah in Lebanon,⁸² while the Palestinian Authority accuses Israel of "indiscriminate" military campaigns that "target civilians."

With respect to the UN, Palestinians prefer to maximize its involvement to legitimize the refugee issue.⁸³ The Palestinians have also profited from UNRWA's presence

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Dumper, Mick. University of Exeter, UK. "An EU Study on the Return and Re-integration of Palestinian Refugees and Displaced Persons." Presented at the Stocktaking Conference on Palestinian Refugee Research in Ottawa, Canada, June 17, 2003.

⁷⁵ Available at: http://news.bbc.co.uk/1/hi/world/middle_east/978626.stm

⁷⁶ http://news.bbc.co.uk/2/hi/middle_east/4650300.stm

⁷⁷ http://news.bbc.co.uk/2/hi/middle_east/4650300.stm

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² International Herald Tribune. Available at:

<http://www.iht.com/articles/2006/04/18/news/web.0418un.php>

⁸³ Brynen, Rex. "The Future of UNRWA: An Agenda for Policy Research." McGill University:

<http://www.arts.mcgill.ca/mepp/prm/papers/future.html>

on the ground. Many municipalities are run by Hamas councils and mayors, creating a void in the funding and implementation of some projects, which is being filled by UNRWA.⁸⁴

The Arab League and concerned Arab countries

The League of Arab States (LAS), which coordinates activities between its 22 member countries, has attempted to create regional standards for the protection of Palestinian refugees.⁸⁵ However, reservations by some states mean many rights are not covered. Host countries have separate departments that deal with refugees, under domestic regulations,⁸⁶ with Lebanon applying the most stringent laws. Rejection of their absorption and resettlement is enshrined in Lebanon's constitution,⁸⁷ so any change in UNRWA's mandate will raise tensions in the country.

Relations between UNRWA and the Arab League are close.⁸⁸ UNRWA participates in some League meetings and coordinates diverse projects with the Arab body.⁸⁹ But many Arab countries do not contribute to UNRWA's budget. Apart from host countries and Egypt, only Saudi Arabia and Kuwait attend major donor meetings with contributions exceeding US\$1 million a year.⁹⁰ Saudi Arabia and Kuwait make generous contributions.⁹¹

NEGOTIATIONS

Main Negotiators

- (1) UNRWA, supported by the United Nations system, as well as Jordan, Lebanon, Russia and China.
- (2) United States, supported by Israel and the European Union
- (3) Hamas, supported by Syria, Iran and (at least in public) the Arab League.

Zone of Possible Agreement⁹²

The Zone of Possible Agreement (ZOPA) in this negotiating process is wide. All three principal negotiators have an interest in at least carrying out UNRWA's original mandate of delivering aid to Palestinian refugees. What is at question here is the method and legal modalities that will allow UNRWA to provide services to all Palestinians, and a

⁸⁴ International Crisis Group. Available at: <http://www.ciaonet.org/wps/icg368/icg368.pdf>

⁸⁵ <http://www.badil.org/Protection/LAS%20.htm>

BADIL Resource Center for Palestinian Residency & Refugee Rights takes a rights-based approach to the Palestinian refugee issue through research, advocacy and support of community participation in the search for durable solutions.

⁸⁶ Ibid.

⁸⁷ Available at: <http://www.arts.mcgill.ca/MEPP/PRRN/papers/lebanon.html>

⁸⁸ Cooperation between the United Nations and the League of Arab States: Report of the Secretary General. 1996. Available at: <http://www.un.org/documents/ga/docs/51/plenary/a51-380.htm>

⁸⁹ Ibid.

⁹⁰ Statement by Peter Hansen the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) to the Council of Arab Ministers of Foreign Affairs, League of Arab Statesn. Cairo, 12 March 2001
Available at: <http://www.un.org/unrwa/news/statements/arab-mar01.html>

⁹¹ Ibid.

⁹² Saner, Raymond. "The Expert Negotiator." pp42-43.

possible US goal of wanting to break up the agency. The reservation price for UNRWA is its integrity as a unique UN agency. Hamas's reservation price (what it will not accept here) is the point where UNRWA, and not the Palestinian Authority, is seen as the custodian of Palestinian interests. The reservation price of the United States is Hamas not changing its policies towards Israel. It will not accept concessions from UNRWA that will strengthen Hamas, and will want to maintain a leading role in UNRWA.

Bargaining

This negotiating process will not last days if the parties pursue a distributive 'winner takes all' approach. There are concessions to be made by all sides to 'share the pie' or else no realistic solution will be reached to provide services and aid to the Palestinians. Integrative bargaining guaranteeing each side will win and lose something in the process is expected if the negotiations are to succeed. In reality this is a complex process. The parties must 'enlarge the pie.' This could be accomplished, for example, by creating a council that brings together representatives of the Palestinian Authority, UNRWA, donor nations led by the US, and the Arab League, to coordinate the delivery of services since donors have divergent points of view on the recently-created fund to provide temporary aid to the Palestinians. The US has objected to including salary payments as part of the new aid program.⁹³

The lack of a Nash solution or the absence of cooperation, is reminiscent of the Prisoners Dilemma, leading to a value that is unfair and/or unacceptable to both sides will not last long. And will the US and Hamas sit together? This is unlikely given the pressures and policies of both sides. A solution could be for a relatively neutral European Union state, like Spain, to mediate the negotiations, and facilitate indirect Hamas-US talks. Some significant confidence-building measures are required at this stage, no matter how small they may seem. One could be Hamas's tacit willingness to recognize Israel as part of accepting a two-state solution, as appears to be happening now.

Know Your Adversar

UNRWA has rich experience in the region and is aware of the circumstances, limitations and powers of each of the two other parties. It also knows that the durability of its administration may lie in the contributions that donor nations, led by the US, make. Hamas controls access to the Palestinian territories and to services provided within its jurisdiction. The US is aware of its own clout and its ability to make life difficult for the Palestinian Authority, but it faces limitations at the Security Council and the General Assembly (where anti-US and anti-Israel positions usually prevail). Now the US faces domestic pressure to pursue a hard-line against Hamas and not to be lenient with UNRWA. US Representatives Mark Kirk and Tom Lantos have introduced new legislation to link future assistance to UNRWA to an "independent, internationally recognized expenditure audit," to ensure that US taxpayers' money "does not go to support terrorist organizations like Hamas."⁹⁴

⁹³ Reuters. May 12, 2006. "Pitfalls await Quartet plan to aid Palestinians."

⁹⁴ Haaretz newspaper. May 6, 2006.

Target points/Past experience/Persuasion-influence Tactics

UN agencies like UNRWA can find themselves in library archives if they do not at least try to address US concerns and interests. The Geneva-based UN Disaster Relief Office (UNDRO) has come under strong US pressure since reform efforts began in 1973.⁹⁵ The State Department demonstrated a “particular antipathy for UNDRO in the first two decades of its creation.”⁹⁶ The US office of foreign disaster assistance perceived UNDRO staff as “disrespectful,” over-spenders, and mismanaged.⁹⁷ In 1991, the State Department argued that UNDRO did not live up to its mandate, so in tandem with UN and international cooperation, the agency was molded into a United Nations Office for the Coordination of Humanitarian Affairs (OCHA). While the US is committed to protecting Israel’s security and right to exist, it wants to ‘reform’ some UN agencies. American Ambassador to the UN John Bolton said ‘the number one objective’ is to ‘aggressively promote and push for management reform, budget reform and reform of the function of the UN Secretariat.’⁹⁸ He criticized “a myriad, almost bewildering range of UN governing councils...”⁹⁹ He confirmed that “as the UN’s largest financial contributor...the United States bears special responsibility because” it is “in the position best suited to advance reform.”¹⁰⁰

UNRWA is walking a fine line in these negotiations. It faced numerous allegations of misconduct and support for terrorism in the United States. U.S. law (section 301 (c) of the Foreign Assistance Act) prohibits American contributions to UNRWA from assisting refugees who have engaged in any act of terrorism.¹⁰¹ An American investigation in 2003 found no evidence of non-compliance by UNRWA.¹⁰² That same year, the US Congress commissioned a review of the Palestinian education curriculum (based on perceptions that UNRWA had overlooked intolerance in some text books in its schools).¹⁰³ A report concluded that the allegations were baseless. Later, Congressman Eliot Engel and a group of 37 representatives accused former UNRWA Commissioner-General Peter Hansen of “his knowledge and indifference to terrorists” on UNRWA’s payroll.¹⁰⁴ Hamas is officially a terrorist group in the US.

It is obvious that the US can utilize both persuasive and influential negotiating tactics, but so can UNRWA and Hamas. UNRWA is the only body on the ground able to

⁹⁵ US Department of State Dispatch Vol. 4, Number 49, December 6, 1993. Bureau of Public Affairs: “Strengthening the Coordination of Humanitarian Emergency Assistance,” Madeleine K. Albright, U.S. Permanent Representative to the United Nations. Statement before the UN General Assembly, New York City, November 19, 1993

⁹⁶ Olson, Richard. Final Report: The Office of US Foreign Disaster Assistance of the US Agency for International Development (USAID). A Critical Juncture Analysis, 1964-2003. Florida International University. Department of political science. 2005.

⁹⁷ Olson, Richard. Final Report: The Office of US Foreign Disaster Assistance of the US Agency for International Development (USAID). A Critical Juncture Analysis, 1964-2003. Florida International University. Department of political science. 2005.

⁹⁸ Statement of US Permanent Representative to the United Nations John R. Bolton. “Challenges and Opportunities in Moving Ahead on UN Reform Hearing before the Senate Foreign Relations Committee.” October 18, 2005. Washington, DC.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ United Nations. Available at: <http://www.un.org/unrwa/allegations/index.html>

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ US House of Representatives. http://www.house.gov/apps/list/press/ny17_engel/pr111704.html

coordinate between the Palestinian people, Hamas and donors. And Hamas itself, while in a corner, has the legitimate backing of its electorate, and it may unleash some of its supporters inside Israel and outside, in a campaign of violence that could again change the dynamics.

Strategy and Tactics

UNRWA has an interest in remaining a viable UN agency and in keeping its organizational structure and budget. It is capable of providing services to Palestinians in the 'territories' and host nations and has the capacity to deal with all the stakeholders, with no legal or administrative hurdles, except for the difficulties on the ground that sometimes face its staff. UNRWA will want to continue operating within General Assembly resolutions that call for the 'return of refugees' and/or 'compensation.' However, UNRWA's board is aware that it is not independent and that it is under the authority of the General Assembly and to some extent the Secretary General, and indirectly to donor nations, mainly the United States, and the European Union.

The US, for its part, wants to ensure that Hamas does not receive aid until its policies change. The US is concerned about overall security and stability in the region, especially in Israel, so it does not favor retribution against Israel or further radicalism among Palestinians. Hence, the United States seeks an organ or a body, over which it has some leverage, similar to UNRWA, with experience on the ground, to ensure that basic needs and services are provided to the Palestinians. The positions of Israel and the United States are close if not identical here.

Hamas is unable to deliver services or even pay the salaries of public servants. It is in dire need of international support to maintain its legitimacy and to avoid public opinion turning against it. Nonetheless, it is concerned about the prospect of a UN agency coordinating with Israel and the US, taking over some of its roles.

The way each side can pursue the above strategies is by playing hardball at the beginning with Hamas and the US (supported by Israel) publicly sticking to their hard-line positions. UNRWA in this case will be aware of the bottom line of what is acceptable and what is possible at the UN through close contact and coordination between the Commissioner-General and the General Assembly, Security Council and the Secretary General. UNRWA's best tactic is to continue public pressure on all sides, through press briefings and warnings in bilateral talks that the situation is edging on a full-blown explosion that could threaten the security and stability of all sides. Depending on the position and strength of the UN in these negotiations, and how favorable it is to US proposals to restructure the agency, the UN may mobilize refugee host governments, whether tacitly or publicly, against or in support of the plan. Countries like Lebanon for example, could lead an outcry against the project if they sense a plan to force the resettlement and naturalization of refugees. This is so because UNRWA is viewed as an internationally legitimate body that keeps the issue of refugees alive. The US is not short of tactics too – above all money and political power. Hamas and UNRWA know that the US is UNRWA's top donor and has significant influence over the EU, especially the UK, to force concessions. Israel, with US support, can also apply pressure tactics, including closures, blocking public utility services in Palestinian areas and making the operations of UNRWA difficult on the ground.

Modes of conflict management

Based on the experiences of both sides and the history and developments on the ground, the US and Hamas are both assertive and uncooperative according to the above grid, which renders their position competitive in negotiations. In contrast, UNRWA, due to its nature and mandate, is in the middle of the grid, positioned in a compromise mode. (See *Chart A*.) What will bring the US and Hamas to the center of the grid are the high stakes involved, especially for the Palestinian Authority, currently witnessing socio-economic collapse and the possibility of inter-Palestinian conflict.

In these negotiations both Hamas and the US are on the left side of the horizontal grid in the uncooperative zone, although Hamas is less assertive (vertically) in the power play since it has less leverage than the US. They both have a negative relationship quality (horizontal axis). UNRWA is in the middle ground. It has a more cooperative relationship with the two other sides, and has at least a neutral relationship with them as well. Its interdependence on Hamas and the US is stronger than the interdependence between Hamas and the US.

Strategic Analysis Checklist

Stakes are highest in these negotiations for UNRWA, followed by Hamas and then the United States.¹⁰⁵ In Outcome Stakes UNRWA scored: 17, Hamas: 16, and the US: 8.¹⁰⁶ In terms of Power Position, the US lead was obvious: 41, UNRWA: 31, while Hamas came in third place: 23. The (average) Common Interests of the three parties were determined to total 6 out of a possible score of 9. Finally, the (average) Quality of Relationship of the three parties was 8 out of a possible score of 15.

If we adapt the Strategic Analysis Checklist scores to a grid and then to the sixteen strategic paths, we find that UNRWA is on the vertical axis that is inclined to be relatively unassertive, while the US is much more assertive, and Hamas is at a point that is close to halfway between the US and UNRWA, but is more unassertive than assertive. In the horizontal axis, since the averages of all three parties were taken together to determine the quality of their relationship and common interests, all three fit in a range that puts them closer to cooperative than uncooperative and more avoidant than accommodative. What is expected in this case is for distributive tactics to be used to elicit concessions, and of importance that there is room for concessions. What the parties must do is to avoid the competitive position and move towards integrative bargaining to reach a practice of compromise, especially in the final two phases of the negotiating process ('Edging Closer' and 'Conclusion or Breakdown'). The negotiators have an opportunity to open a '*Johari Window*'¹⁰⁷ by becoming aware of previously unknown motives or behaviors. This could make the overall common interest of providing services to the Palestinians smoother and more possible.

¹⁰⁵ Formulae of calculations and methods based on Raymond Saner's "The Expert Negotiator."

¹⁰⁶ Current developments, history, and the arguments of the three sides were taken into consideration when making the calculations.

¹⁰⁷ According to Wikipedia, a Johari Window is a metaphorical tool used to help people better understand their interpersonal communication and relationships. It involves placing issues in one of four different quadrants that describe the kinds of information available to parties in a specific exercise (in this case negotiations). The parties could either all be aware of pertinent information, or only one or some of them could be aware of the information, or may be none of them.

The above calculations indicate that negotiators could engage in push and pull diplomacy, engaging and disengaging behavior (to search for common interests), and the possibility of withdrawal and avoidant attitudes. Furthermore, diverse stakeholder groups and the involvement of the EU, Arab governments, refugee host governments, UN anxiety, the US Congress, human rights groups, and rivalries in the Palestinian system will complicate negotiations.

SCENARIOS

The outcome of negotiations can be envisioned through 'scenario planning' exercises.¹⁰⁸ This involves determining the 'certainties, uncertainties, and driving forces' of the current crisis. Thus, the most significant and serious uncertainties: Hamas modifying policies and UN accepting change in UNRWA mandate and capacity will be examined rigorously against the driving forces, before possible negotiations scenarios and outcomes are determined.

*Driving Forces*¹⁰⁹

The main factors that influence this negotiating process are Hamas's policies; donors' led by the US with the close coordination of the EU; UNRWA's mandate and experience on the ground; willingness of the UN to modify UNRWA's mission and capacity; the Middle East conflict; the volatility and sensitivity of the refugee issue; inter-Palestinian rivalry; Israeli occupation in the West Bank and parts of Gaza; the dynamics of Israel-Hamas violence; the presence of Hamas's leadership abroad and its influence by Syria, Iran, and Hizbollah; the positions of the stakeholders in this negotiation; nationalistic emotions of Palestinians; international power balances; Israel's rejection of the return of refugees; rejection of refugee host countries to absorb them; difficulties on the ground in the territories; UNRWA's status as guarantor of the legitimacy of the refugee issue.

Certainties

Socio-economic problems in the Palestinian territories; necessity for donors and money; vulnerability of refugees and reliance on UNRWA; opposition of some countries to restructuring UNRWA; US domestic politics; Israeli-US alliance; UNRWA's budgetary crises; US pressure on the UN; Middle East tensions; a history of non-compliance by donors to financial pledges; international power divisions over UN matters, with Russia and China resisting some US proposals; Hamas's grassroots support; Arab and Muslim suspicions of the US; the American positions on Hamas and the peace process; the size of US and EU contributions to UNRWA.

Uncertainties

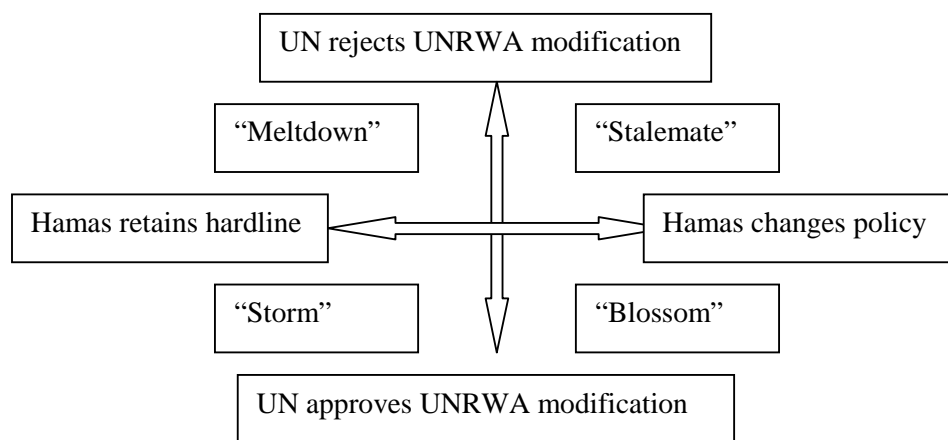
UN response to UNRWA modification proposal: Hamas policies; consequence of further deterioration in the Palestinian economy; military and security dynamics; the positions of Iran and Syria, and their influence on Hamas and Hizbollah along the Lebanon-Israel border; the limit of international pressure on Hamas; future of Fatah-Hamas ties; the

¹⁰⁸ This exercise is according to Professor Thierry Senechal's methodology, which is similar to the Shell Global Scenarios method.

¹⁰⁹ Some of the driving forces, certainties and uncertainties have been mentioned several times in this case study, so repetition will be avoided as much as possible.

implementation of General Assembly resolutions; reaction of refugees and host governments to US and EU proposals, as well as the positions of major Arab countries like Saudi Arabia, Jordan and Egypt; the outcome of the Iraq conflict; Iran's nuclear standoff with the West.

Four Possible Scenarios¹¹⁰



Meltdown

The UN rejects the modification of UNRWA's mission. UNRWA negotiators are instructed by the General Assembly to resist proposals to provide assistance to the Palestinians beyond the framework of General Assembly resolutions, and previous aid interventions during the *intifada*. General Assembly members, with the support of some Security Council members, empower UNRWA to deliver services and aid to non-refugees in line with previous experiences. Countries hosting refugees apply strong pressure on the UN not to modify UNRWA's role in the absence of Arab-Israeli accords. The US and the EU disagree over the conditions of delivering aid to the Palestinians, with the US insisting that the salaries of public officials working under Hamas be excluded from aid; the EU believes this is unrealistic. The only thing all parties could accept is that UNRWA continue its mandate and provide aid to non-refugees. However, the US makes clear that it will only channel money to the Palestinian territories through a few NGOs that barely have a presence and decides to reduce its contributions to UNRWA. The EU decides to only provide the minimum possible and is seeking ways to increase its funding of minor NGOs that could offer services to the Palestinians. In this scenario, Hamas is empowered by public opinion supporting it against perceived foreign interference. It rejects concessions to the US and Israel, and refuses to give UNRWA prerogatives that it sees as part of the legitimate operations of the Palestinian Authority. This scenario, in accordance with systems dynamics theories, envisions deterioration in the socio-economic conditions of the

¹¹⁰ The four scenarios are based on the research that was conducted in this study, as evident in the background information and the 'certainties' and 'uncertainties.'

Palestinians, more inter-Palestinian clashes, Hamas resuming attacks inside Israel, and Israel responding. Syria and Iran give the green light for Hizbollah to launch attacks against Israeli positions from South Lebanon.

Possible solution: agreement between the EU and the US to introduce a Security Council bid establishing a special fund to support non-refugees, with clear instructions for Hamas to cooperate. Distribution of aid supplies could be carried out by the relevant UN agencies on the ground and partly through European, US, and Palestinian NGOs. The Security Council resolution will include the conditions that Hamas must meet before international aid can be distributed through the Palestinian Authority. Contributions by the US and the EU will be reduced and pressure will be applied on some Arab and Islamic governments and funds to make up the difference.

Storm

The UN approves UNRWA's modified mandate but Hamas retains its hard-line policies. Negotiations fail to persuade Hamas to renounce violence and to commit to the Road Map peace plan. The US and the European Union, with the support of key Arab countries, are able to convince the General Assembly about the significance of altering UNRWA's mandate to improve socio-economic conditions. The United States promises to increase aid to UNRWA, to be restructured and divided according to geographic regions, with field offices becoming UN organs that directly report to the General Assembly, while the UNRWA headquarters become a general service center for the UN Agency for the Support of non-refugees. The European Union and Israel fully support the plan. However, Hamas is very suspicious about the plan and comes under heavy pressure from Syria, Iran and its leadership abroad not to accept, on grounds this could be a pretext to annul the refugees' right of return. Hamas insisted on providing services to the Palestinians through Palestinian Authority offices or joint projects. The US rejected Hamas's stance. UNRWA's approval of it embarrasses the UN, because it appears involved with Western powers against an Arab government. This leads to heightened tensions in the region and the prospect of more violence. Hamas steps up its anti-Israel rhetoric and sporadic fighting begins.

Possible solution: international sanctions can be applied against the Palestinian Authority and key Arab governments can be pressured to do the same. However, aid and support for the Palestinian people will be channeled through UNRWA anyways, through empowering the agency to provide services to non-refugees, as was the case during the intifada. Since Russia and China had joined the US and the EU in supporting UNRWA's restructuring, they are also angered by Hamas's moves, and threaten Syria and Iran not to oppose efforts at the Security Council on matters related to Iran's nuclear energy, and pressure Syria not to interfere in Lebanon. This could be an important way to address Hamas's intransigence. The US may also have to back down on its proposal to restructure UNRWA. It may accept making UNRWA's support for non-refugees enshrined in the agency's General Assembly mandate, while keeping intact its mandate towards refugees.

Blossom

Hamas, UNRWA and the US agree on specific arrangements to restructure the agency, with the support of the EU, the General Assembly, and the tacit approval of the Arab League and key Arab governments. Hamas also agrees to soften its anti-Israeli rhetoric to recognize Israel and accept the Road Map. Hamas is under heavy pressure from its people to deliver services after suffering from electricity outages, a lack of fuel, shortages of food and water.

There is increased pressure on Syria and Iran at the Security Council not to interfere in the process. Damascus and Tehran instruct Hizbollah not to cause any escalation in the region and for Hamas's leadership abroad to stay at least neutral. Israel makes public its offer to Hamas to ease closures and to immediately transfer the tariff returns that it had been holding for the Palestinians. The EU and the US declare their readiness to increase by fifty percent the money that they contribute to UNRWA after restructuring. Financial pledges are also made for the previous UNRWA field offices in Arab capitals. The US and the EU are engaged in discussions on the fate of refugees with host governments. This is a scenario that could witness the absorption of refugees, with the promises of generous financial and social support from the UN and donor nations.

Follow up: this is a very good starting point to bring Hamas's leadership abroad in line, convince it to join the ranks of the Palestinian Authority and play a role in the resumption of negotiations towards implementing the Road Map. Another significant undertaking is for Israel to make good on its pledges to ease closures and sanctions. Also necessary is a realistic US and EU-backed initiative by the UN to tackle the matter of refugees through compensation in the case of some countries like Jordan and Syria, and through third-country repatriation in the case of Lebanon where the absorption of Palestinian refugees could throw the country into another civil war.

Stalemate

Hamas agrees to change its policies and accepts donor nations' bids to give UNRWA a prime role in receiving, distributing and administering aid. However, the General Assembly fails to approve the modifications. This leads to a veritable stalemate since the US and Hamas reached an accord on the mechanisms that would allow UNRWA to restructure operations. Hamas is also able to convince its leadership abroad about the gravity of the situation and the inevitability of making concessions to the US and Israel in the face of a brewing humanitarian crisis, which could turn the Palestinian public against Hamas and its ideologies. The US and the EU are unable to guarantee to Russia, China and some Arab states that restructuring UNRWA would not necessarily constitute a unilateral (Israeli-biased) solution for the refugee problem. The US garners the necessary domestic support for increasing aid to UNRWA's new operations, as does the EU. This is one example in which the General Assembly finds itself with 'teeth' to stick to its principles, but mainly because major blocs have to settle scores with the US over other problems regarding Iraq, the Kyoto Protocol, and the refusal to enter the new human rights council. If the situation is not quickly resolved, inter-Palestinian rivalries and Hamas-Israel violence could erupt. Socio-economic difficulties risk inflaming the whole region, already suffering from extremism and radicalization.

Possible solution: The US, EU, Israel and Hamas, have two options. They either agree to create an internationally monitored body to oversee aid and services to the Palestinians, or concessions will be made on the proposal to restructure UNRWA. This could be through keeping UNRWA's mandate unchanged, but adding to it the new role of supporting non-refugees. This mechanism could explicitly make clear that a change on Hamas's side will allow for international aid to again go through the Palestinian Authority.

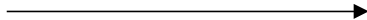
CONCLUSION

Negotiators discussing the fate of international aid, which amounts to the daily bread and butter of hundreds of thousands of Palestinians, will find that a multitude of the Middle

East's nearly-biblical problems have gone unresolved for so long, to the point that no issue can be tackled without triggering another explosive situation. UNRWA has been one of the few sources of hope for Palestinians, especially the refugees, so negotiators will have to remain sensitive to its mandate. At the same time, the agency provides a possible way out for all the parties involved in this conflict to work around their deeply entrenched differences to address a serious problem that could become dangerous. This is a classic case in which time is not on the side of the negotiators. Negotiators must also be aware that in keeping with Middle East tradition, political stalemates usually result in deadly military action.

QuickTime™ and a
TIFF (LZW) decompressor
are needed to see this picture.

Time™ and a
W) decompressor
see this picture.



ANNEX 2¹¹¹*Graphs and Charts*

Table I
Annual Growth Rate of Registered Palestine Refugees and Female Percentage,
1953 -2000

Year	Total Refugee Population	Annual Growth Rate*	Number of Females	Female (%)
1953	870,158	..	430,483	49.5%
1955	912,425	1.9%
1960	1,136,487	2.9%
1965	1,300,117	2.9%
1970	1,445,022	2.5%
1975	1,652,436	2.7%	803,030	48.6%
1980	1,863,162	2.2%	905,606	48.6%
1985	2,119,862	2.6%	1,033,054	48.7%
1990	2,466,516	3.8%	1,204,644	48.8%
1995	3,246,044	4.9%	1,588,505	48.9%
2000	3,737,494	3.1%	1,831,806	49.0%

* Annual growth rate is the percentage growth in the number of refugees registered with UNRWA. As a number of registered refugees don't register immediately the new births and deaths, the annual growth in the registered refugees is an approximation of the annual growth rate of the refugee population. In the period between 1990 - 1995, refugee registration increased.

Palestinian refugees (about 5 million) represent approximately 18% of the total number of refugees in the world. UNRWA registered refugees represent approximately three quarters of Palestinian refugees world-wide.

¹¹¹ Unless otherwise stated, graphs and charts here are from UNRWA.ORG

Table II
Registered Palestine Refugees in Camps and as a percentage of the Total Registered Refugees, 1953 -2000

Year	Total Refugee Population	Refugee Population in Camps	Refugee Population in Camps (%)
1953	870,158	300,786	34.6%
1955	912,425	351,532	38.5%
1960	1,136,487	409,223	36.0%
1965	1,300,117	508,042	39.1%
1970	1,445,022	500,985	34.7%
1975	1,652,436	551,643	33.4%
1980	1,863,162	613,149	32.9%
1985	2,119,862	805,482	38.0%
1990	2,466,516	697,709	28.3%
1995	3,246,044	1,007,375	31.0%
2000	3,737,494	1,211,480	32.4%

Table III
Registered Palestine Refugee Population by Age Group and by Field as of June, 2000

Field \ Age Group	Jordan	West Bank	Gaza Strip	Lebanon	Syria	Agency-wide	% of Total Population
< 8	192,727	58,542	145,191	35,599	49,814	481,873	13%
8 - 16	350,333	140,027	230,778	77,677	83,130	881,945	24%
16 - 26	312,672	110,185	145,975	67,659	72,365	708,856	19%
26 - 36	259,446	86,591	103,285	63,390	59,824	572,536	15%
36 - 46	152,402	62,471	70,105	47,860	44,386	377,224	10%
46 - 66	108,156	46,499	52,074	30,149	26,742	263,620	7%
> 66	194,456	78,694	77,214	54,138	46,938	451,440	12%
Total	1,570,192	583,009	824,622	376,472	383,199	3,737,494	100%

Around 56% of Palestine refugees are under 25 years of age, indicating a youth bulge.

Table IV
Demographic Data and Demographic Indicators, as of June 2000

Demographic Data and Indicators	Jordan	West Bank	Gaza Strip	Lebanon	Syria	Agency-wide
Registered Refugees	1,570,192	583,009	824,622	376,472	383,199	3,737,494
Registered Female Refugees	764,306	287,658	404,968	185,055	185,819	1,831,806
Population below 16 years of age (%)	34.6	34.1	45.6	30.1	34.7	36.5
Camp Population	280,191	157,676	451,186	210,715	111,712	1,211,480
Percentage of Camp Population to Total Registered Refugees	18%	27%	55%	56%	29%	32%
Number of Camps	10	19	8	12	10	59
Infant Mortality Rate per 1000 Live Births	32	27	33	35	29	31.2
Average Family Size	5.9	5.8	6.0	5.3	5.3	5.7
Crude Birth Rate per 1000 Population in 1998	34.0	33.7	35.6	24.6	33.0	32.2

Figure 1
Registered Palestine Refugee Population by Age Group,
as of June, 2000 - Percentages

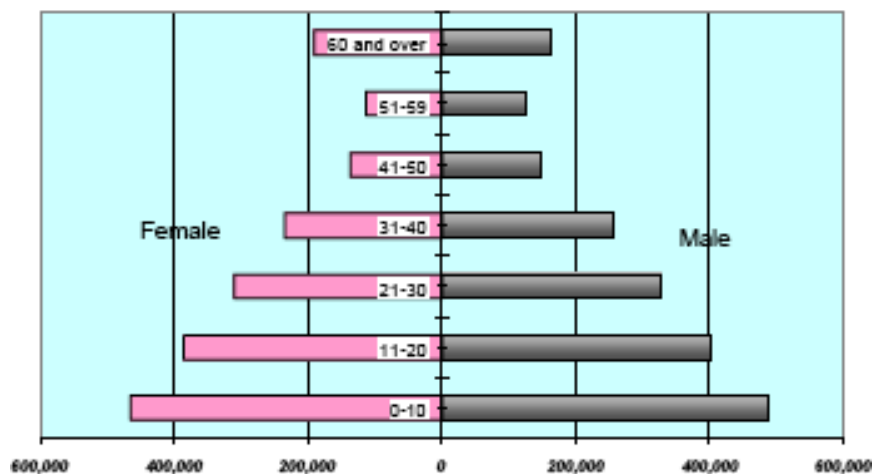
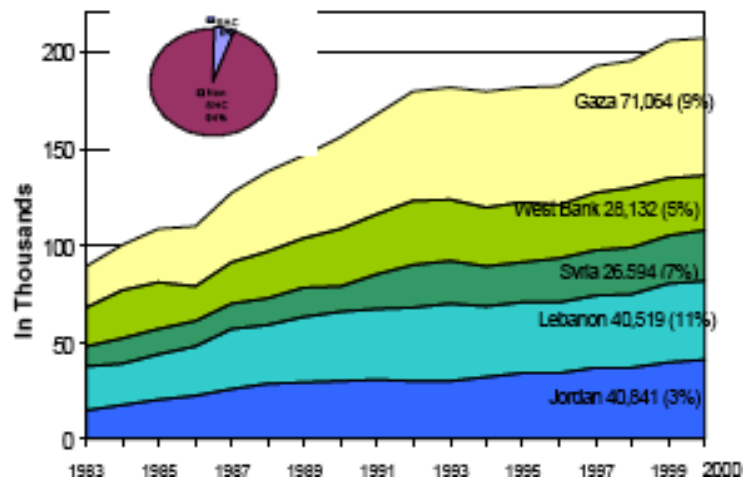


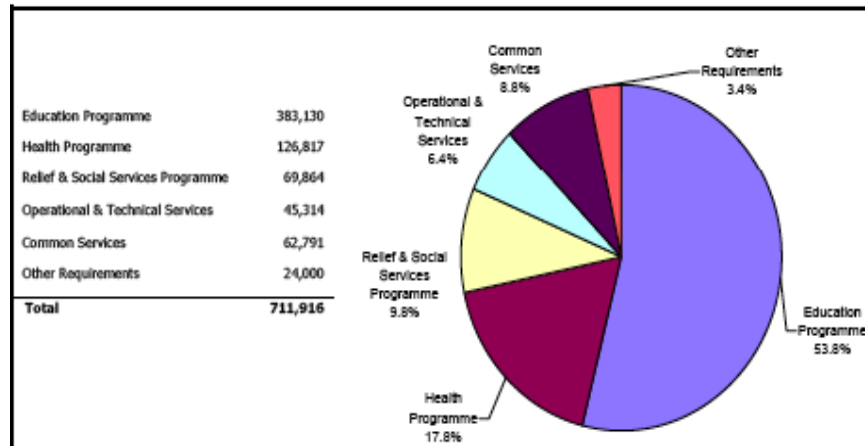
Figure 3
The Number of Special Hardship Cases (Individuals) by Field, 2000



Finance Sheet 1				
Income and Expenditure Regular Budget (US\$ m)				
2004			2005	
302.8		Income:	320.6	
16.1		Donor Contributions	13.1	
3.4		Disengagement Plan	17.8	
		UN Funding	3.0	
		Other Sources		
	322.3	Total estimated income		354.5
247.3		Approved Budget:	266.0	
<u>83.0</u>		Staff Costs	<u>73.3</u>	
	330.3	Non Staff Costs		339.3
		Less		
(8.5)		PSC recovery	(10.0)	
	321.8	Net Approved Budget		329.3
		Additions		
		Disengagement Plan	13.1	
		MTP 2005	17.8*	
		Transferred from	<u>7.4</u>	
		Emergency Appeal		38.3
		Total Budget		367.6
	0.5	Financing Gap		(13.1)
* The Medium Term Plan for 2005 was reduced from US\$34.2 million to US\$17.8 million due to funding constraints. (Source of data: UNRWA)				

Non-funding of the above gap of US\$13.1 million would result in the non-implementation of some planned activities, for example Vocational Training Centers upgrades, learning infrastructure and capacity building.

FIGURE 8: 2004-2005 REGULAR BUDGET BY PROGRAMME
(Cash and In-Kind, In Thousands of United States Dollars)



Finance Sheet II: USG Voluntary Contributions to UNRWA¹¹²

Table IV
Demographic Data and Demographic Indicators, as of June 2000

Fiscal Year	Regular Budget			Emergency Appeal		
	Jordan	West Bank	Gaza Strip	Lebanon	Syria	Agency-wide
2003: Data and Indicators	\$88.00 million			\$46 million		
Registered Refugees	1,570,192	583,009	824,622	376,472	383,199	3,737,494
Registered Female Refugees	877,407	287,658	404,968	189,038	198,819	1,831,806
Population below 16 years of age (%)	34.6	34.1	45.6	30.1	34.7	36.9
2005: Data and Indicators	\$88.00 million			\$29 million		
Camp Population	157,676	157,676	451,186	229,712	1,211,480	
Percentage of Camp Population to Total Registered Refugees	18%	27%	55%	56%	29%	32%
2006: Data and Indicators	\$84.15 million			\$51 million (proposed)		
Number of Camps	15	19	8	12	15	59
Infant Mortality Rate per 1000 Live Births	32	27	33	35	29	31.2
Average Family Size	5.9	5.8	6.0	5.3	5.3	5.7
Crude Birth Rate per 1000 Population in 1998	34.0	33.7	35.6	24.6	33.0	32.2

¹¹² US State Department International Information Program. April 10, 2006. Available at: <http://usinfo.state.gov/utis/printpage.html>

ANNEX C

Poll I: Palestinian Public Opinion Poll on Hamas

About two months after Hamas won Palestinian elections, the Palestinian Center for Policy and Survey Research conducted a poll asking the Palestinians about their opinion of Hamas, Fatah and the peace process. The poll below was conducted between the 16th and the 18th of March.¹¹³

Opinion on Hamas and Fatah in post-elections period

- 47% would vote for Hamas and 39% for Fatah if new elections were held today.
- Majority expected Hamas's success in government, a suspension of international aid and the success of Hamas in finding alternative sources of support.
- Majority opposes Hamas's recognition of Israel in line with donor nations' demands

The peace process following Hamas's victory

- 75% want Hamas to negotiate with Israel
- Majority support Road Map, with recognition of Israel conditional of establishing Palestinian state
- Israel's occupation is the second among the concerns of those polled, the top concern is poverty and unemployment

¹¹³ <http://www.pcpsr.org/survey/polls/2006/p19e.html#hamas1>

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NUCLEAR NEGOTIATION: A PSYCHOLOGICAL ANALYSIS OF NEGOTIATION STRATEGIES FOR JAPAN, NORTH KOREA AND THE US

Hanneul Earl Han

ABSTRACT

This chapter examines the role of psychology in arms deterrence negotiations. It applies several psychological approaches, including stereotypical and attributional distortion, misperception, violence diplomacy, and reactive defensive and aggressive policies. As a case study, this chapter examines U.S. arms negotiations between and North Korea and Japan. First, the paper explains how the current nuclear situation came to be in East Asia under a psychological lens and then proposes two scenarios. Second, the text sets out a negotiation strategy using the psychological approach to understand each country's motivation for collaboration, compromise, competition and avoidance. It demonstrates how psychology can be applied in negotiations to create a peaceful outcome, as well as showing how psychological tactics can lead to stalemate, and/or further weapons development.

INTRODUCTION

North Korea has been an ongoing problem for the US and Japan, much like an open wound that they hoped would heal on its own, but frustratingly continues to fester. Since the Korean War, North Korea, officially called the Democratic People's Republic of Korea, has become increasingly isolated from the rest of the global community in its steadfast adherence to communism set forth by its revered leader, Kim Il-Song, and now espoused by his son, Kim Jong-Il.

On the capitalist side, Japan and the U.S. are united in their interests to curb North Korea's weapons proliferation, in order to ensure stability in the Far East. Unlike the past, today's Japan faces a very hostile and potentially dangerous North Korea. Though current public sentiment in Japan is against nuclearization, increasing threats may allow a rationalization for nuclear weapons.

Thus nuclear proliferation in East Asia is a growing concern for the U.S., whose main objective is to keep stability in the region. This paper will explore the two possible scenarios that may arise given the current conditions: (i) North Korea will build and demonstrate a functional nuclear weapon, and (ii) Japan will begin developing nuclear weapons. Then it will set out a strategy solution for each scenario for the U.S., using the psychological approach such as Robert Jervis's Misperception theory¹ as well as stereotypical and attributional distortion, reactive defensive and aggressive policy, distorted hypothesis testing, self-fulfilling prophecy, and superordinate goal analysis by Jeffery Rubin² in order to explain the motives of Japan and North Korea and to guide the U.S.' negotiation strategy.

¹ Jervis, Robert. "Hypotheses on Misperception" *American Foreign Policy*.

² Rubin, Jeffery. "Psychological Approach" *International Negotiation*.

THE SITUATION AND THE POSSIBLE TRAJECTORIES

U.S. and Japanese relations with North Korea have been tepid since North Korea's conception. North Korea views Japan and U.S. as threats to its survival, while Japan increasingly sees North Korea as an unstable nation capable of irrational behavior and retaliation on Japanese soil.

Added to this is the concern that South Korea may develop nuclear weapons as well. However, South Korea's foreign policy towards its northern brother during the last two presidencies has been one of unconditional aid and engagement, and not of balancing threats. South Korea has had a nuclear program in the past, but they have reported their actions to the IAEA in full compliance, and have dismantled their nuclear weapons laboratories. Intelligence reports may indicate some nuclear activity in South Korea, but are premature. Overall, Washington's influence in Seoul is significantly more powerful than in Tokyo, and therefore South Korea is much more hesitant and restrained to develop nuclear weapons. Given that South Korea's nuclearization is highly unlikely, the scope of this paper will be limited to two scenarios: a nuclear North Korea, and a nuclear Japan.

The First Scenario: A Nuclear North Korea

North Korea is a victim of misperception. Jeffery Rubin states that "it is not actual differences that drive parties to behave...but perceived differences...[and] may act as if conflict existed."³ This holds true for North Korea when one looks at its official newspaper, *Rodong Sinmun*. Its April 30, 2005 edition warned its citizens of a Japanese reinvasion, stating that "the Japanese reactionaries' distortion of Japan's history moves for ideological and moral agitation aimed at militarizing and fascistizing the Japanese society [for purposes of reinvasion]."⁴ The article surmises that the negation of its war crimes and its claim to the disputed Dokdo Islands signals a planned coordinated effort by the aggressive Japanese.⁵ Though some may argue that the *Rodong* is merely propaganda, given the literature one cannot deny the possibility that North Korea envisions other states, particularly Japan and the U.S., as belligerent nations carefully constructing plans for attack.

The above example also illustrates how North Korea is privy to what Rubin calls "stereotypical distortion...good versus bad, black vs. white..." Robert Jervis also states that decision-makers will see other states as more hostile.⁶ Through these lenses, North Korea perceives itself as a champion for the independent communist nation-state against the U.S. and Japanese capitalist juggernauts. When the U.S. began to push for UN sanctions against North Korea given its threat to refuel nuclear reactors for weapon-manufacturing purposes, Pyongyang declared the sanctions an unprovoked act of war.⁷ Thus, North Korea simplifies the complex situation to a polar structure of 'us versus them.'

With this mindset, Kim Jong-Il flagrantly develops nuclear weapons and may possess a working nuclear weapon capable of mass damage. It is not surprising, given

³ Ibid. p. 261.

⁴ "KCNA Slams Japan's Invariable Wild Ambition for Reinvasion" *Korean Central News Agency of DPRK*.

⁵ Manning, Robert A. "United States-North Korean Relations: From Welfare to Workfare?" *North Korea and Northeast Asia*. 76.

⁶ Jervis, Robert. "Hypotheses on Misperception" *American Foreign Policy*. 470.

⁷ Manning, Robert A. "United States-North Korean Relations: From Welfare to Workfare?" *North Korea and Northeast Asia*. 75.

North Korea's distorted lens according to the Jervis's view,⁸ that it uses what Thomas Schelling calls violence diplomacy, or the threat of damage in order to exploit the enemy's wants and fears, thus forcing the party to comply.⁹ This provides the rationale behind North Korea's seemingly violent and threatening actions, arising in response to heightened misperceptions. In a sense, it uses threats as bargaining power to gain leverage in its negotiations.

This is a great cause for fear. Should this trajectory continue, it would lead to further, more dangerous consequences. As North Korea follows its strategy of violent diplomacy, it may find itself "entrapped" in its course of action, thereby incurring increasing costs to justify its previous actions.¹⁰ Eventually, the conflict could continue to spiral until we reach the first scenario: a fully nuclear North Korea.

The Second Scenario: A Nuclear Japan

Japan is an interesting case given its imperial and military past, and its current pacifist constitution. Ten years ago, a nuclear Japan would have been unthinkable, due to its own tragic experiences with nuclear weapons in World War II. However, the 1998 North Korean missile launch over the Sea of Japan served as a harsh reminder of Japan's vulnerability.¹¹ The 2005 North Korean declaration of nuclear weapons, and the test of an alleged nuclear weapon in 2006¹² only served to heighten the conflict between North Korea and its neighbors, especially Japan.

This historical background serves as one motivation for Japan's nuclearization as the increasing conflict "predisposes decision makers to develop relatively simplistic, stereotypical views of the other side and the issues under discussion."¹³ As the conflict intensified, Japan perceived North Korea more and more as an irrational actor bent only on coercive and violent tactics. The *Daily Yomiuri*, a Japanese newspaper, recently published a news article, which highlighted the imminent danger of North Korea and its long range missiles.¹⁴

North Korea's repeated use of violence diplomacy over a long period of time, with its missile launch, declaration of weapons and nuclear tests, also may have pushed Japan to pursue a "reactive aggressive" strategy, in which an attack is met with a counterattack, and cooperation is returned in kind.¹⁵ In this variation of tit-for-tat, the aggressor can be psychologically induced to become a cooperator due to the expected reciprocity of his opponent. However, Japan cannot effectively counterattack a possibly nuclear nation without an arsenal of its own, and thus is severely limited in negotiations.

Another issue to keep in mind is the abduction of Japanese citizens by North Koreans during the 1970's to train North Korean soldiers.¹⁶ Though North Korea has

⁸ Jervis, Robert. "Hypotheses on Misperception" *American Foreign Policy*. 470.

⁹ Schelling, Thomas C. "The Diplomacy of Violence" *Essential Readings in World Politics*. 241.

¹⁰ Rubin, Jeffery. "Psychological Approach" *International Negotiation*. 264.

¹¹ Fifield, Anna. "US Condemns North Korean Sea of Japan 'missile launch'" *Financial Times*.

¹² Sanger, David. "North Korea Says It Tested a Nuclear Weapon Underground" *The New York Times*.

¹³ Rubin, Jeffery. "Psychological Approach" *International Negotiation*. 265.

¹⁴ "North Korea's Nuclear Threat; Missile defense requires due diligence," *The Daily Yomiuri*.

¹⁵ Rubin, Jeffery. "Psychological Approach" *International Negotiation*. 265.

¹⁶ Kim, Hong-nack. "Japan in North Korean Foreign Policy" *North Korean Foreign Relations In the Post Cold War Era*. 121.

released some hostages and confirmed others to be dead, Japan believes some remain alive in North Korea and has continued to pressure North Korea for more information. In this case, Japan may be suffering from “attributional distortion,”¹⁷ where Japan may strongly view North Korea as distrustful, and thus may interpret North Korea’s seemingly honest statements and cooperative efforts as only manipulative ploys. If this is the case, then any subsequent “benevolent” actions by Pyongyang will be met with suspicion in Tokyo.

Along with these reasons, Japan is now facing a beleaguered U.S. military fighting a seemingly endless war on terror, and a looming China gaining more economic clout in East Asia. The Japanese Diet has already passed a bill calling for a referendum amending the Constitution, which if passed would allow Article 9, forbidding a full military, to be modified or repealed.¹⁸ Though current public sentiment is against nuclearization, increasing threats may permit a rationalization of nuclear weapons, setting the stage for our second possible scenario, a nuclear Japan.

STRATEGY ANALYSIS¹⁹

The paper will use various strategies by Saner and Rubin. The first level will be a SWOT analysis of each country, a strategy grid detailing the country’s relative cooperativeness and assertiveness and subsequent reaction, the country’s role in negotiations (defender, player, conductor), and the country’s aspiration and reservation prices.²⁰ The SWOT (Strengths, Weakness, Opportunities, Threats) analysis will give a general overview of each country’s preliminary position in negotiations. The strategy grid will show how each country views its own position relative to another, and suggest the most likely reaction. The country’s role gives insight into its behavior in multilateral negotiations, whether it will take a neutral position to seek an agreement (conductor), be primarily concerned with their own self-interests (defender), or seek to produce an agreement that coincides with its objectives (driver). The reservation price will state the minimum concessions needed to engage each country in negotiations, while the aspiration price will list the concessions each country hopes to secure. The first level of analysis will give a macro-view of the negotiations for each of the two scenarios.

The second level goes in depth into the negotiation process using several psychological analyses presented by Rubin, such as stereotypical and attributional distortion, reactive defensive and aggressive policies, distorted hypothesis testing, and superordinate goals.²¹ Stereotypical distortion shows how a country may tend to simplify a complex situation into a simple, often binary world of good vs. evil, black vs. white, etc, while attributional distortion explains how a country is positively biased with its own “benevolent” actions, yet negatively biased towards another country’s actions. Reactive strategies are based on a tit-for-tat approach, and can be a defensive or aggressive reaction. Distorted hypothesis testing explains how a country can prove its neighbor’s belligerence through provocation, while a superordinate goal can unite countries together despite

¹⁷ Rubin, Jeffery. “Psychological Approach” *International Negotiation*. 265.

¹⁸ Norimitsu, Onishi. “Japan to Vote on Modifying Pacifist Charter Written by U.S.” *The New York Times*.

¹⁹ Saner, Raymond. *The Expert Negotiator*, 2nd Ed.

²⁰ Ibid. Chapter 2 (Distributive Bargaining) chapter 5 (Strategy), chapter 11 (Complex Negotiations).

²¹ Rubin, Jeffery. “Psychological Approach” *International Negotiation*. 265.

conflicting interests. Violence diplomacy by Schelling²² and coalition building and third-party mediation by Saner²³ are also key strategies used in the negotiation projection.

SWOT Analysis for the Three Countries

Japan

- **Strengths:** Japan has one of the largest economies in the world, giving it plenty of economic clout in negotiations. It is also under the U.S. security umbrella.
- **Weaknesses:** The country is a close target for North Korea missiles. It is also heavily dependent on the U.S. for national defense, having no military of its own.
- **Opportunities:** With North Korea claiming to have nuclear weapons, conservation members of the Japanese Diet can seize the issue as a call for a revision in the constitution that would allow for a military and conventional weapons for defense.
- **Threats:** With the Iraq War raging, the U.S. may decrease its presence in East Asia and shift more of its military resources to the Middle East, which would increase Japan's vulnerability to North Korean threats. In addition, its economic leverage may become limited with China's growing market and military power looming in the distance.

North Korea

- **Strengths:** North Korea has one of the largest armies in the world. It also has proclaimed to have nuclear weapons, which have been used as a bargaining chip for aid. In addition, North Korea has powerful sympathetic neighbors – China and Russia – who sit on the UN Security Council.
- **Weaknesses:** There is reported widespread famine throughout the country. North Korea's economy is in shambles, and it is heavily dependent on foreign aid and illicit income from drugs and money laundering.
- **Opportunities:** It can use its weapons to obtain aid and technology transfer. A good faith effort in curbing its nuclear activities can potentially bring more aid and FDI.
- **Threats:** The weapons are North Korea's only source of leverage in international negotiations, and thus any weapons deterrence can substantially weaken the nation. Being labeled part of the Axis of Evil, invasion by the U.S. is a possibility when looking at its Axis neighbor Iraq. Also, a nuclear or military Japan could threaten North Korea's sovereignty and national security.

The United States

- **Strengths:** The U.S. has the largest economy in the world, as well as arguably one of the world's most powerful militaries and national defense systems. It has strategic allies in East Asia (South Korea, Japan) as well as a strong military presence (Okinawa, Seoul, Guam). It is a permanent member of the UN Security Council and NATO.

²² Schelling, Thomas C. "The Diplomacy of Violence" *Essential Readings in World Politics*. 241.

²³ Saner, Raymond. *The Expert Negotiator*, 2nd Ed. Chapter 11 (Complex Negotiations).

- Weaknesses: It is currently involved in the Iraq War, which is draining military resources and creating large fiscal deficits. Also due to the war, it has soured diplomatic relations with a number of nations.
- Opportunities: It can work to strengthen its military and economic ties with South Korea and Japan, thereby protecting its interests in East Asia. Also, it can use the North Korean conflict to develop strategic links with China and Russia to resolve the crisis.
- Threats: North Korea's nuclear weapons bring great instability to the region and jeopardize U.S. forces in the area.

SCENARIO A: NUCLEAR NORTH KOREA

North Korea

Defender

Reservation Price

Humanitarian aid

Aspiration Price

Light water reactors, oil, diplomatic relations, monetary aid, removal of U.S. forces in Seoul

Main Negotiation Asset

Nuclear weapons, information about kidnapped Japanese

Strategy Grid

<i>Country</i>	<i>Assertiveness</i>	<i>Cooperativeness</i>	<i>Strategy</i>
US	Mid	Low	Avoidant to Compromise; Attributional distortion
Japan	High	Low	Competitive; Stereotypical distortion, violence diplomacy

U.S.

Driver

Reservation Price

Immediate halt to weapons development

Aspiration Price

Inspection by IAEA and UN inspectors, dismantling of weapons, halt to opium trade

Main Negotiation Asset

Aid (food, oil, money), Diplomatic relations

Strategy Grid

<i>Country</i>	<i>Assertiveness</i>	<i>Cooperativeness</i>	<i>Strategy</i>
North Korea	High	Low to Mid	Competitive to Compromise; Mediator intervention, Tit for tat
Japan	High	High	Collaborative; Coalition

Japan

Conductor to Defender

Reservation Price

Immediate halt to weapons development

Aspiration Price

Inspection by IAEA and UN inspectors, dismantling of weapons, information on kidnapped Japanese citizens

Main Negotiation Asset

Aid (food, money)

Strategy Grid

<i>Country</i>	<i>Assertiveness</i>	<i>Cooperativeness</i>	<i>Strategy</i>
North Korea	Mid	Mid	Compromise; Tit for tat
US	Mid	High	Compromise to Collaborative Coalition, group think

Environment

The U.S. is a player in this case, since it holds an overwhelming power advantage against Japan and North Korea, and can leverage considerable clout to promote its interests. North Korea will most likely be a defender, only agreeing to negotiate if specific criteria are met. If not, it will remove itself from negotiations and become avoidant. Japan will be a conductor if it seeks an agreement only on nuclear weapons. However, if the kidnappings become a significant issue, then Japan will become a defender.

Strategy

The U.S. will have to lead the negotiations, seeing as its power advantage may move North Korea to compromise. Again, due to the Jervis “misperceptions,” it is likely that North Korea will use an attributional distortion strategy to defend itself against possible manipulation by the U.S. North Korea will temporarily stop nuclear activity to demonstrate its genuine intentions, but will base U.S. motives on power aggrandizement in East Asia, and not on regional stability. In fact, North Korea will point to the U.S. nuclear weapons possession and its military presence in Seoul as proof that the U.S. is only interested in maintaining its hegemonic status quo. Thus North Korea will view all U.S. attempts at negotiation as manipulative, and strategically so, in order to discount the value of U.S. concessions, and ensure a high price for its own concessions.

Towards Japan, North Korea will use stereotypical distortion strategy and violence diplomacy. Using stereotypical distortion allows North Korea to simplify the complex relationship between itself and Japan to a binary – “good versus evil” – although in actuality North Korea has committed terrorist acts on Japanese soil, and Japan has offered North Korea aid in an effort to develop closer relations. By creating a “good versus evil” structure, North Korea will then have the rational basis to carry out violence diplomacy against the Japanese “aggressors,” psychologically threatening Japan with nuclear violence in return for aid. To the North Koreans, this violence diplomacy will be seen as a “Robin Hood” act, taking money by force from the evil rich nation and disseminating the bounty to its poor and deserving citizens. Plus, North Korea can also use attributional distortion in regards to its acknowledgement of the kidnapped Japanese citizens. It can state that in the spirit of cooperation, North Korea gave up information about the kidnappings, to which Japan has responded only with demands for more information. Japan’s actions are then painted by North Korea as ungrateful and uncooperative.

Because Japan has no nuclear weapons, it is limited in using psychological approaches because it cannot effectively apply psychological stress. Thus, the best strategy for Japan is to align with the U.S. and give psychological support, possibly through coalition building, to the negotiation process. However, Japan risks its own private interests to be forgotten in the negotiation process, especially if they are in the “group-think” scenario. The bill to revise the Constitution²⁴ can well be a bluff by the Japanese to make certain that its security interests are represented.

The U.S. should use a combination of biased mediation and “reactive defensive” strategy. First, to counter the psychological bias by North Korea, the U.S. can bring in China, North Korea’s favored ally, as a biased mediator. While China’s bias for North Korea is apparent, it also has several reasons to keep North Korea in check, such regional stability and stemming the flow of North Korean refugees. Rubin states “a biased third party...is often the best one to influence a highly recalcitrant disputant.”²⁵ As a result, North Korea cannot use stereotypical nor attributive distortion on a powerful ally, and thus its negotiation strategy will be weakened.

With China’s participation, the U.S. should offer some form of official formal diplomatic relations in the first round of its reactive defensive strategy. This will demonstrate earnest cooperation and a shared desire to come to consensus from the U.S. side. North Korea may very well stick to its attributional distortion and decry the U.S.

²⁴ Norimitsu, Onishi. “Japan to Vote on Modifying Pacifist Charter Written by U.S.” *The New York Times*.

²⁵ Rubin, Jeffery. “Psychological Approach” *International Negotiation*. 260.

attempts as insincere and respond with threats. However, the following defensive reaction by the U.S. will appear justified to the Chinese, and North Korea may lose the favor of its Chinese ally for its supposed irrational response to a seemingly sincere overture by the U.S. Thus, North Koreans may feel pressure to respond positively, may shift North Korea's strategy to compromise, or collaborate with both countries. The reactive defensive strategy can be used until an agreement is reached calling for North Korea's weapons program to be dismantled.

An example of a *positive reactive defensive strategy*

U.S.	North Korea*
Diplomatic relations	Temporary halt to weapons
Food and oil aid	Weapons inspections
Light Water Nuclear Reactors	Dismantling of uranium enrichment programs

An example of a *negative reactive defensive strategy*

U.S.	North Korea*
Diplomatic relations	Threats of weapons demonstrations
Mobilization of U.S. troops in Japan	Reconsideration of demonstrations
Offer of aid	Threat of violence to Japan to exact more aid
Mobilization of U.S. troops in DMZ	Agreement of previous offer of aid

**possible response*

North Korea may still adhere to its attributive distortion strategy even with China's participation. In this case, the U.S. can change its "reactive defensive" strategy to a "reactive aggressive" strategy. The U.S. would first have to convince the other major East Asian powers, China and Russia, that non-aggressive negotiations were carried out in good faith, but fruitless. This can be potentially dangerous because North Korea's neighbors, China and Russia, may feel threatened. However, if the U.S. can win their support, it can respond to North Korean threats with its own. Hopefully, this powerful and forceful strategy will turn North Korea from an antagonist into a collaborator. However, this increased assertiveness may push North Korea to become avoidant, thus rendering the strategy a failure with a nuclear North Korea still on the horizon.

An example of a *negative reactive aggressive strategy*

U.S.	North Korea*
Diplomatic relations	Threats of weapons demonstrations
Threats of limited air strikes	Reconsideration of demonstrations
Offer of aid	Threat of violence to Japan to exact more aid
Threat of missile launches	Agreement of previous offer of aid

**possible response*

Of course, it is important to note that the danger of a reactive aggressive strategy is when the opposing side is irrational, and hence will respond irrationally, leading to escalating spirals and possibly nuclear war.

However, North Korea may not be alone in its desire for nuclear weapons. Japan has long been under threat by North Korea's missiles, and a nuclear China has shifted the power structure in East Asia. Japan may believe that only membership to the "nuclear" club would ensure its survival in the long term. With nuclear weapons, Japan can protect itself against North Korean threats, as well as shift the balance of power from Beijing to Tokyo.

SCENARIO B: NUCLEAR JAPAN

North Korea

Defender, conductor

Reservation Price

Immediate halt of weapon activity

Aspiration Price

Diplomatic relations

Main Negotiation Asset

Nuclear weapons, information about kidnapped Japanese

Strategy Grid

<i>Country</i>	<i>Assertiveness</i>	<i>Cooperativeness</i>	<i>Strategy</i>
US	Mid	Low	Avoidant to Compromise Cautious alliance, superordinate goal
Japan	Mid	Low	Avoidant to Compromise Stereotypical distortion

U.S.

Driver

Reservation Price

Immediate halt to weapons development

Aspiration Price

Bring Japan back to pacifist state

Main Negotiation Asset

Security Umbrella

Strategy Grid

<i>Country</i>	<i>Assertiveness</i>	<i>Cooperativeness</i>	<i>Strategy</i>
North Korea	High	Low to Mid	Competitive to Compromise Cautious alliance, superordinate goal
Japan	High	High	Collaborative Selective perception, reactive defensive, superordinate goal

Japan

Defender

Reservation Price

Assurance by North Korea on weapons deterrence, strengthening of the U.S. security umbrella

Aspiration Price

Some military and weapons, information on kidnapped Japanese citizens

Main Negotiation Asset

Weapons program

Strategy Grid

<i>Country</i>	<i>Assertiveness</i>	<i>Cooperativeness</i>	<i>Strategy</i>
North Korea	High	Mid	Competitive Distorted hypothesis testing, self-fulfilling prophecy
US	Mid	High	Compromise to Collaborative Reactive defensive

Environment

The U.S. will again be a player in this case, due to its power advantage. Looking at Japan's new weapons potential, North Korea may view Japan as a military power, and thus shift its strategy to compromise. Japan will be a defender, as it will protect its decision to nuclearize as a necessity for its survival.

Strategy

Japan can first use distorted hypothesis testing on North Korea to provoke aggression from its neighbor. For example, it can question North Korea's military buildup, to which North

Korea will respond quite aggressively. With this demonstration of aggression by North Korea, Japan now has a rational basis to pursue nuclear weapons development. Japan should repeatedly use distorted hypothesis testing to get even stronger reactions. It can also use the “self-fulfilling prophecy” strategy as well, as North Korea will respond with military mobilization to Japan’s nuclear process. It can also use this strategy on its other neighbors (China, South Korea, Russia) to build a stronger reason for nuclearization. As the aggression increases, Japan can use stereotypical distortion to reduce the conflict into an “us versus them” scenario to mobilize domestic support for nuclearization.

With increased aggression by its neighbors, Japan can demonstrate to the U.S., its main defensive ally, that it had little choice but to nuclearize in order to protect its interests. Then it can pursue a reactive defensive strategy, where it incrementally reduces weapons development activity, in exchange for greater military support and some conventional weapons.

An example of a *Reactive defensive strategy (Positive)*

<i>Japan</i>	<i>U.S.*</i>
Halt nuclear weapons development	Sharing of military intelligence and resources
Slow weapons development	More U.S. funding for Japanese defense
Dismantle nuclear weapons program	Allow for some military units, weapons

**possible response*

Of course, if the U.S. responds with a defensive measure, then Japan can just reverse the trend and incrementally build its nuclear weapons. It may be forced out of the U.S. security umbrella, but by that point Japan will be fully nuclearized and can provide for its own national defense.

North Korea will immediately seize upon Japan’s actions as proof of its malicious intent, and will use stereotypical distortion to justify its own military build-up and nuclear weapons pursuit. However, because a nuclear Japan will lower the “threat” value of its own weapons programs, it will be in North Korea’s interests to cooperate with the U.S. in order to contain Japan’s nuclear policy. In fact, North Korea may be psychologically motivated to ally with the U.S. because of a “superordinate goal” to contain Japan. In this case, the goal of halting Japan’s nuclear advancement may supersede its conflict with the U.S., especially since a nuclear Japan would be geographically much closer. The U.S. will also use the “superordinate goal” strategy to contain North Korea’s concerns and bring them in as an ally.

The U.S. will have to assuage Japanese fears of increasing vulnerability in the face of North Korea’s and perhaps even China’s military forces. The U.S. should begin by reiterating its military alliance with Japan and guarantee American protection under the U.S. security umbrella. This will change Japan’s selective perception of its national defense from a half-empty to a half-full prospect, with room for improvement with U.S. support and without nuclear weapons. With this assurance, the U.S. can begin to propose a

joint military effort and psychologically paint Russia and China as a common “concern,” hopefully creating a superordinate goal that will motivate Japan to be more cooperative as Rubin predicts.²⁶

The U.S. can then use a reactive defensive strategy in order to curb Japan’s nuclear interests. The strategy would be similar to the example shown for Japan above; however, in the case that Japan responds aggressively, the strategy may be as follows:

An example of a *Reactive defensive strategy (Negative)*

<i>U.S.</i>	<i>Japan*</i>
Reiteration of military support	Reiteration of need of nuclear weapons
Shifting more military to Seoul	Halt to weapons development
Collaboration of military strategy	Reiteration of need of nuclear weapons
U.S., Russia, and Chinese collaboration	Halt to weapons development

If Japan does not respond well to the U.S. reactive defensive strategy, then the U.S. can shift to a reactive aggressive strategy. This, in turn, may clear North Korea’s distorted view of U.S. intentions, and lead to a view of the U.S. as a possible collaborator. The strategy may play out like this:

Reactive aggressive strategy (Negative)

<i>U.S.</i>	<i>Japan*</i>
Reiteration of military support	Reiteration of need of nuclear weapons
Threat to remove Japan from U.S. umbrella	Halt to weapons development
Collaboration of military strategy	Reiteration of need of nuclear weapons
Mobilization of U.S. forces in Japan/Korea	Halt to weapons development

*possible responses

However, this aggressive strategy may further develop Japan’s stereotypical distortion and lead it to assume that the U.S. has turned into an aggressor, reducing the negotiations to an “us vs. them” scenario as mentioned previously. Thus the reactive aggressive policy may spiral downward, leading to the U.S. defending itself against a possibly nuclear Japan.

CONCLUDING THOUGHTS

In the final assessment of the nuclear situation in East Asia, the two scenarios presented in this paper show that East Asia may be in for a rude awakening as Japan and North Korea race to go “nuclear.” Either country having nuclear weapons would have ripple effects in

²⁶ Rubin, Jeffery. “Psychological Approach” *International Negotiation*. 265.

the immediate region, with China and Russia reviewing their national security policies in the East, and the U.S. possibly increasing its military presence. South Korea may defy the U.S. and publicly develop nuclear weapons.

Some have suggested that a European Union-like model should be applied to East Asia to maintain stability in the region. A unified East Asia would indeed bring about much needed cooperation between the countries, especially in geopolitical matters. However, a unified East Asia is extremely premature, if not impossible. Even a unified Korea is considered unlikely in the future. Old wounds from the past continue to reopen and divide; a full page ad in the Washington Post by Japanese lawmakers denied the existence of sexual slavery by the Imperial Army.²⁷ This will of course only incite the tempers of Korea and China, and lead to further distrust. Until the countries decide collectively to bring closure to the past, a political union like the EU will never take place.

Therefore, in order to deftly diffuse the escalating tension, the U.S. must utilize the psychological approaches by Rubin, Saner, and others when crafting their negotiation strategy. As the driver of the negotiations, it has to keep the other actors, North Korea and Japan, engaged and willing to cooperate. Given the friction, the U.S. should be diplomatic in its approach, but it also should not rule out using stronger negotiation tactics if need be. One can only hope that the U.S. will be successful in its negotiations, and finally bring some calm to the nuclearization storm.

²⁷ “Ad on ‘Comfort Women’ Posted in US Paper” *The Korea Time*.,

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WHAT SCENARIOS FORETELL

CONFLICT MANAGEMENT AND THE ISSUE OF KASHMIR

Tuhin Sen

ABSTRACT

This chapter analyses the malignant nature of the polycentric conflict regarding the territorial rights over Kashmir. In doing so, the chapter focuses on the protracted Kashmir conflict (festered for over 60 years), which is now underlain with a dangerous nuclear dimension. The author draws on works of the epistemological communities dealing with political, strategic and military issues and constructs a scenario matrix (developed by Dr. Albert Bressand of Shell Corporation). Using the scenario matrix, as the analytical base, the author suggests possible strategies and tactics for bilateral negotiations as outlined in the works of Yiu and Saner. The chapter identifies four distinct scenarios and shows how in each case the practice of distributive bargaining is likely to lead to an upward spiral of violence. Hence, the author suggests that in a protracted malignant conflict situation like Kashmir, the stakeholders are better off looking for ways and means of keeping the process of integrative bargaining alive.

INTRODUCTION

This paper analyzes the malignant nature of the polycentric conflict¹ regarding territorial rights over Kashmir. The Kashmir of today (India administered Kashmir on the Indian side and Pakistan administered Kashmir on the Pakistani side) is the erstwhile princely state of Kashmir, which 'acceded' to the Indian Union after India's independence from British colonial rule in 1947. The accession was challenged by Pakistan on the ground that ethnic composition of Kashmir (a Muslim majority state) warranted a full integration with Pakistan due to the salience of the 'two-nation theory' propounded by M.A. Jinnah (the father of the modern nation state of Pakistan). Therefore, from the Pakistani viewpoint, the accession neither had, nor currently has legitimacy. This portrays India as an aggressor and eventually an unlawful occupier of a territory that should have been Pakistan's. From 1947 onward, successive Pakistani governments (both those that were democratically elected and those imposed by the all powerful Pakistan Armed Forces) have tried to wrest back control of this territory. The means at their disposal included military action, raising the issue at the highest international fora, covert warfare by sponsoring 'freedom fighters' (terrorists according Indian interpretation), and sporadic attempts at dialogue and conciliation. It is important to note at this point that India and Pakistan have fought two wars on the issue of

¹ For a detailed discussion on the malignant nature of a polycentric conflict vis-à-vis the Cyprus dispute, see Saner and Yiu 2002. 'External Stakeholder Impacts on Official and Non-Official Third Party Interventions to Resolve Malignant Conflicts: The case of a failed intervention in Cyprus', Centre for Scio-Economic Development, Geneva, Switzerland.

Kashmir (1965 and 1971), and a limited one in 1999 at the icy heights of the Kargil Sector. Needless to say, none of these has produced any lasting solution or any solution whatsoever. On the contrary, this deep mutual distrust has vitiated the atmosphere to an extent that shunning the gun and coming to a negotiating table today, seems an uphill task.²

Added to this, is the position of the 'Kashmiris', many of whom want autonomy from both Indian and Pakistani rule. Kashmiris identify themselves as the inhabitants of Kashmir, irrespective of their religious affiliation. By that logic, both Muslims and Hindus are considered to be 'Kashmiris.'³

Due to the strategic location of Pakistan in the geopolitics of the region, there has been heavy involvement by external stakeholders, including the US and China, in this conflict. Therefore, the Kashmir conflict is a multi-stakeholder conflict, where the number of stakeholders has steadily increased. Today, besides the governments of Pakistan, India, China, USA and the United Nations, there are Kashmiri separatist groups, internationally designated terrorist organizations, and human rights groups who are involved in this conflict. In some sense, it is a conflict quite like the one in Cyprus, but what distinguishes Kashmir from Cyprus is the long shadow of a nuclear standoff between India and Pakistan. This makes the conflict critical to humanity as a whole and thereby calls for negotiation much more than a call to arms. On the question of negotiation, entrenched positions after years of distrust and wars make the undertaking particularly difficult. The multiplicity of stakeholders makes the task challenging, to say the least.

This paper is an effort to revisit the Kashmir conflict in its 60th year and highlight the futility of the competitive strategy adopted by India and Pakistan. The argument here is that malignant conflicts cannot be solved by wars or by distributive bargaining—a fact that would serve policymakers and general readers well.

DOCUMENT MAP

This paper is organised as follows. Section 1 outlines the methodology adopted in the analysis of the conflict. Section 2 deals with a brief history and the timeframe of the study. Section 3 outlines the competing positions of various parties to the dispute. The section also deals with the broad actor set and the recent developments that potentially impact the future course of events. Section 4 outlines the scenario-mapping framework complete with the driving forces, the key uncertainties and the critical assumptions. Section 5 outlines the scenarios and possible end-states that might arise given the dynamics between the various actor sets. Section 6 is a detailed analysis of the merits/demerits of distributive/integrative bargaining in foreseen scenarios. Section 7 is a comprehensive roundup of the bargaining strategy and tactics. Section 8 offers lessons from the 60 year-old conflict in Kashmir.

² Kohli provides an insightful account of the failure of the democratic process in Kashmir in Kohli 1990. Kohli, A.. 1990. 'Democracy and Discontent: India's Growing Crisis of Governability'. Cambridge: Cambridge University Press.

³ For a fuller account of who comprises the group called 'Kashmiris' see Mathur 1992. 'The State and the Use of Coercive Power in India.' *Asian Survey*, 32 (4), April, 337-349.

SECTION 1

A note on methodology

This analysis draws on the theoretical premises of Dr. Raymond Saner⁴ and Lichia Yiu⁵ in creating a framework of analysis for the Kashmir dispute. The theoretical premises outlined in their works have been supplemented with scholarly literature on the subject. To make the argument well rounded, information has been drawn from literature on military strategy available from the strategic planner community in the US, Pakistan and India. Literature from the epistemic community of strategy planners and military commanders has been used in order to highlight their views on the futility of a military solution to this dispute. The mode of conflict management grid has also been used⁶ in order to arrive at possible negotiation strategies and tactics. In planning the scenarios for future patterns of conflict and their management through negotiations, the scenario planning methodology developed by Dr. Albert Bressand for the Shell Corporation has been drawn upon.

SECTION 2

Violence, Retribution—History's Lessons

The birth of India and Pakistan was steeped in unprecedented violence. The two-nation theory⁷ meant that there were large-scale exchanges of population and subsequent violence perpetrated by one community against the other. The ensuing blood-bath sowed the seeds of distrust, which even today remains in the popular psyche. The years that followed saw India and Pakistan go to war twice, with the 1971 war ending with the defeat of Pakistan and, more importantly, the dismemberment of the country into the separate and independent nation state of Bangladesh. This outcome was significant in that it dealt a body blow to the idea of the two-nation theory.⁸ The dismemberment of Pakistan has stayed on in the Pakistani memory as a brazen challenge to the very idea of the eventual survival of Pakistan. The 1971 war ended with the Shimla Agreement signed on July 2, 1972, between Indian Prime Minister Indira Gandhi and Pakistani President Zulfikar Ali Bhutto. Both India and Pakistan agreed not to change the actual Line of Control (LoC) – the ceasefire line serving as the de facto border between India and Pakistan – and vowed to respect it "without prejudice to the recognized position of either side" and to "refrain from the threat or use of force in violation of the line." During subsequent conflicts (Kargil, for instance) and in talks between the two countries this agreement is always cited as a reference framework for any bilateral discussion.

⁴ For a detailed discussion of strategy and tactics in negotiations, see Saner 2005. *The Expert Negotiator*, Lieden/Boston: Martinus Nijhoff.

⁵ See Saner and Yiu, 2002.

⁶ Saner, Raymond *The Expert Negotiator*. 2005

⁷ Varshney discusses the two-nation theory in brief in Varshney, A. 1991. 'India, Pakistan and Kashmir: Antinomies of Nationalism'. *Asian Survey*, 31 (11), November, 997-1019.

⁸ Ibid.

The Nuclear Dimension

What followed in the wake of the 1971 conflict changed the dynamics between the two nations forever. In 1974, India tested its first nuclear device—an act that was followed by Pakistan in the 1980s, adding the feared nuclear dimension to the India-Pakistan conflict.

The subsequent years saw domestic politics in India and Pakistan evolve in a way that fuelled unrest in Kashmir.⁹ The stranglehold of the military in Pakistan politics, and the cynical and narrow-minded politics practiced by the Indian state in Kashmir led to the denial of democracy in Kashmir. By late 1980s the battle lines were clearly drawn: a nascent anti-India sentiment, with substantial help from Pakistan, erupted into a full-blown separatist movement. The ranks of the separatists were filled by many 'jihadi' fighters previously engaged in the anti-Soviet struggle in Afghanistan. These were pushed into the Kashmir valley (see Figure 4) by the Pakistani Military Intelligence agency, Interservices Intelligence (ISI) to take on the Indian security forces. The atrocities perpetrated by the separatists on ethnic lines against the minority Hindu population was matched by even more brutal force by the Indian state security apparatuses of the army and paramilitary forces, setting off a cycle of violence and ruthless retribution. The valley has been largely cleansed of Hindus and those who decided to stay on are soft targets of terrorist attacks.¹⁰

A turning point came in 1998 when India and Pakistan detonated their second-generation nuclear devices, setting off alarm bells around world capitals. It was followed by Pakistan's intrusion into the Kargil sector of the Indian-held part of Kashmir. India's response was to fight a limited and a bloody war, often supported by air attacks on the Indian side.¹¹ President Clinton's mediation made Pakistani troops pull back to their positions behind the LoC.

The War on Terror and its Aftermath

The September 11 attacks changed the Indo-Pak-Kashmir dynamics yet again. The American military action against the Taliban in Afghanistan and the Afghan-Pakistan border saw Pakistan emerge as a US ally in the American War on Terror (WoT). It also saw the heightening of American concern with Pakistan's overt and covert support to the Kashmir separatists' cause. In 2001 a few Jaish-e-Muhammad (JEM) militants mounted an audacious attack on India's parliament. An infuriated New Delhi responded by amassing a large part of its offensive military assets on the Pakistani border. The alarmed world community brought enormous pressures on both the parties to de-escalate tension and introduce Confidence Building Measures (CBMs) in an effort to normalize relations.

Overt militarization has ceased but the covert war between the Indian state and the separatists goes on in the Indian held side of Kashmir. On the diplomatic front, both nations have taken tentative steps in the direction of rapprochement beginning with dialogue and reconciliatory gestures. The normalization of relations has had the heads of states talking to each other directly—a process often marred by sporadic violence in the background. The result is a hardening of stance (primarily on the Indian side) thereby preventing any large-scale concession from either side. In an analytical sense, mutual distrust, historical baggage, and violence on the ground have made integrative bargaining difficult. The centrality of

⁹ For a discussion of evolving dynamics of Indo-US relations see Ganguly 2003. 'The Start of a Beautiful Friendship? The United States and India'. World Policy Journal. Spring.

¹⁰ Ibid.

¹¹ For details see Glardon, T.L. 2005. 'Balancing U.S. Interests amidst the India and Pakistan Conflict.' US War College Strategy Research Project.

Kashmir to the domestic politics of both the countries means any move toward reconciliation has to be portrayed as one in which neither country loses face or 'strategic' advantage. For, if either does, it would confront certain rejection from its domestic constituency, making the agreement or the move lose domestic legitimacy.

Timeframe of the study

The history of the Kashmir dispute presented here is far from comprehensive. The historic complexity of the conflict deserves a thorough elaboration, which is beyond the scope of this paper. It is, then, on the post-Kargil phase of the dispute – 1999 till the present – upon which this paper will concentrate, ending at the impending Indo-US nuclear deal, which if ratified by the US Congress, would have wide ranging ramifications on Indo-Pak relations vis-à-vis Kashmir.

Destruction? Doomsday?—Portent for the future:

A few facts highlight the competitive positions of Kashmiris, the Indian and the Pakistani states. These could be clubbed under an omnibus category of 'power asymmetry'. But ultimately it is at the very founding of India and Pakistan where the biggest difference lies. Simply put Kashmir, India and Pakistan represent what Varshney calls '*antinomies of nationalism*'.¹² While India was founded on secular nationalism, Pakistan was founded on religious nationalism, and Kashmiri nationalism has its base in ethnic nationalism. This has played out in the region's complex ethnic mix of Kashmiris: Punjabis, Hindus and Buddhists of Ladakh. In the last sixty years these opposing strains of nationalist feelings have not been reconciled. Moreover, the rekindling of Kashmiri Nationalism (between 1983-91) has added a whole new dimension to the Kashmir conflict. Therefore, any dialogue between Pakistan, India, and representatives of Kashmiris – be it Jammu Kashmir Liberation Front (JKLF), or the recently constituted All Party Hurriyat Conference (APHC) – starts from far beyond the *zone of possible agreement (ZOPA)*.¹³

Next comes the question of power asymmetry. In spite of its nuclearization, Pakistan is still an inferior power, militarily speaking.¹⁴ In terms of population, size of the economy, GDP and territorial spread, India is ahead of Pakistan on all counts. By virtue of its sheer size and weight in regional politics, it is considered a regional hegemon with global power ambitions (Wagner 2005). From Pakistan's point of view this power asymmetry has portents of *distributive bargaining* (zero sum game) whereby India's gain will be considered as Pakistan's loss and vice-versa. By its very nature, distributive bargaining would have to have a winner and a loser – hardly a condition for a meaningful negotiation to take place.¹⁵ Besides, the power asymmetry can set a high *aspiration price* for India, far more than what Pakistan could afford. Let us consider, for instance, the full and final removal of all terrorist units operating in the valley within a predetermined time period. From India's point of view this is a fully legitimate demand, as it would consider itself the superior power and the nation whose territory has been violated. Pakistani negotiators, however, could never guarantee such a state of affairs. The terrorists in India's

¹² See Varshney 1991 for details.

¹³ Saner, Raymond *The Expert Negotiator* 2005 p.108

¹⁴ For a changing nature of India's military doctrine see Ashraf 2004. 'Doctrinal Reawakening of the Indian Armed Forces'. *Military Review*. November December.

¹⁵ Saner 2005

eyes are freedom fighters in Pakistan's eyes. For the last sixty years the state of Pakistan has provided moral, material and diplomatic support to the 'freedom fighters.' It would be politically disastrous for any Pakistani authority to make such a move or *concession*. Such a move, shorn of domestic legitimacy, would be rejected outright by the people and lead to a stalemate. After an analysis of the Indo-Pak conflict and the failed negotiations one gets an idea why both sides to the dispute have achieved nothing with distributive bargaining. Having said that, the road to *integrative bargaining* has not been an easy one to walk either given the bitterly opposed positions on both sides. This has been made worse by the history of violence and deeply held hurt from post partition killings between Hindus and Muslims on either side of the international border. As a result, it has not been easy to arrive at the mutual give-and-take and sharing, which is the cornerstone of any *integrative approach*.

To look for an answer as to why the path to integrative bargaining is perilous, a closer look must be taken at the actor set in Indo-Pak dispute.

The Armed Forces of Pakistan

The most important constituent in Pakistani politics – the armed forces – has ruled Pakistan for most of its independent existence. As a collective, it enjoys unprecedented power, prestige and resources. A negotiated settlement would take away from the centrality of their existence in domestic politics. Moreover no agreement could be inked without the army's tacit support, which is unlikely to come if the expected outcome is considered inimical to its interests. Therefore, the army would most certainly use an *avoidance strategy* to stall any talks whatsoever.¹⁶ As part of the armed forces, the Inter Services Intelligence (ISI) plays a crucial role in Kashmir. It is the nodal agency that channels, funds, coordinates activities of separatists groups, and actively assists in infiltration across the border into India. Without democratic accountability, ISI and the armed forces act with absolute autonomy and pursue their own agenda, often to the detriment of Pakistan's larger national interests.

The 'freedom fighter' / 'terrorist groups' in the Valley

The forceful dismissal of Kashmir's chief minister, Farooq Abdullah in 1983 and the rigged elections of 1987 were turning points in the domestic politics of the valley (the Indian side of Kashmir). The denial of basic electoral choice heightened the alienation of the Valley's Muslims. Little wonder, in the late 1980s, various splinter groups representing various sections of the disgruntled populace sprang up, claiming to aggregate the legitimate political interests of the people of Kashmir.

The JKLF is one of the most prominent of these groups active in the valley today. Primarily comprising Sunni Muslims, its avowed goal is 'azadi' or independence from both India and Pakistan. In a way, therefore, theirs is an effort to realize illusory 'Kashmiriyat.'

While the JKLF is considered to be relatively moderate, groups such as *Hezbollah*, *Harkat ul Ansar*, *Hijbul Mujahedin*, *Allah Tigers* and *Al Barq* use violence as the primary means of political activity. They seek total accession to Pakistan and have radical recruits from Afghanistan, Sudan, Lebanon, Syria, Palestine, Algeria and Saudi Arabia.¹⁷

¹⁶ Ibid.

¹⁷ Glardon provides a comprehensive account of the groups operating in Kashmir in Glardon, T.L. 2005. 'Balancing U.S. Interests amidst the India and Pakistan Conflict.' US War College Strategy Research Project.

To coordinate the activities of all these separatist interests, the *All Party Hurriyat Conference* (APHC), an amalgamation of 23 Kashmiri separatist groups, was formed as a political front to further the cause of Kashmiri separatism. Besides the APHC, there are groups such as *Lashkar-e-Toiba* (LeT) and *Jaish-e-Muhammad* (JeM). The plethora of groups makes it difficult for the separatists to have a unified voice and objective. Their random killings of innocent civilians do not do any good to the cause of Kashmiris. Post 9/11 and the launch of WoT, the Bush Administration has been increasingly vocal in telling Pakistan to reign in the separatists.

The Pakistani tactic of using these groups to wear down the Indian security forces' resolve thereby gaining an upper hand at the negotiating table seems counterproductive. If anything, such tactics have hardened India's resolve and have often given India a reason to pursue a *competitive strategy*, low on cooperative intent in the analytical framework of the mode of conflict management as outlined by Saner.¹⁸

The United States of America

The continuing War on Terror (WoT) put Pakistan in its old role of a trustworthy (albeit occasionally so) ally of the US. In return, Pakistan expects reciprocity in the form of military hardware and other developmental aid. However, the American position of maintaining a balanced relationship ('balanced bilateral stability') with both the countries has strategic import.¹⁹ America wants a stable South Asia for its long-term interests and President Musharraf, in a way, has been able to keep a semblance of stability in the region by countering the Al Qaeda threat – often at a great personal risk. Yet, the US has not desisted from speaking its mind about the need for Pakistan to rein in the 'freedom fighters' who perpetrate violence across the border on the Indian side of Kashmir. Many scholars see a novel dimension in the Indo-US relations based upon the new, enhanced level of engagement between the USA and India. These engagements have been diplomatic, military, economic, and even include the issue of nuclear cooperation.²⁰ However a recent American War College article does acknowledge that America's capability to get both sides talking, thereby resolving the dispute is at best limited.²¹

India

While Pakistan, as a relatively weaker power in the dispute, wants to internationalise the Kashmir issue, India is vehemently opposed to this. According to India, Kashmir is an integral part of India and therefore third party involvement is out of question. Except for the first UN brokered ceasefire in 1949, India has not entertained any missive on the part of the UN, or any other power.

India's burgeoning economic and military power is, however, viewed suspiciously by the Pakistani establishment. Post Kargil, the formulation of the 'cold start' military doctrine (offensive capabilities of the forward formations of the Indian forces with 24 hour reaction time) and India's intention of acquiring a 'blue water' navy (with strategic and operational depth beyond its exclusive economic zone (EEZ), is largely an attempt to gain leverage at the negotiating table should such a possibility arise.²²

¹⁸ For details see Saner 2005.

¹⁹ See Glardon 2005 for details.

²⁰ See Ganguly 2003 for details.

²¹ For a comprehensive understanding of this issue, see Glardon 2005.

²² For details see Ashraf 2004.

THE ROAD AHEAD – CHARTING OUT THE SCENARIO

In mapping the scenarios for the future of Indo-Pak relations vis-à-vis Kashmir, it is important to identify the key steps in the scenario mapping framework. A detailed elaboration – stage by stage – of the process is beyond the scope of this paper. However, the stages of problem definition, identification of the driving forces and key uncertainties, are not. On this basis, a matrix that leads to possible scenarios can be constructed.

The problem

The problem is the existence of a polycentric, malignant conflict involving Kashmir, Pakistan and India. India and Pakistan are nuclear powers who have a sixty year old history of armed conflicts.

The driving forces

Military

Disputed territory of Kashmir, border skirmishes, low intensity war against India, Al Qaeda/mercenaries, separatist groups, possibility of a nuclear stand-off between Pakistan and India.

Political

Central political issue for Pakistan is the loss of territory. For India it is Pakistani support for 'terrorist' groups operating in the 'valley'.

International

An anxious international community, human right watchdogs, radical Islamisation of a region leading to a dangerous arc stretching from Iran, through Afghanistan, Pakistan and on to the northern boundary of India.

Key uncertainties

- The level of Islamisation of Pakistan that could undermine its very existence.
- The level of inequality in India that could lead to internal social alienation.

Critical assumptions

A time-span of 10 years is assumed, together with India and Pakistan not withdrawing their mutual claims of Kashmir; Kashmiri Separatist Groups not declaring autonomy from both; Al Qaeda and other terrorist groups not withdrawing from Kashmir Valley; the Pakistani armed forces playing a pivotal role in domestic politics; Indian economy growing at a healthy 8%-10% year on year.

THE SCENARIOS

Plotting the axes along a matrix we get our scenario quadrants. On the vertical axis we have a less or more Islamist Pakistan. On the horizontal axis we have a socially equitable and a socially non-equitable India. In keeping with the theoretical premise that the religious identity is at the core of Pakistan's identity, this axis is logically consistent with argument presented here. The vertical axis captures India's present economic state of euphoria. An average growth rate of 8%-10% year after year does seem impressive, but the India has to

tackle the deepening inequality that has the potential to rupture the social fabric.²³ Put simply, a more Islamist Pakistan could lead to instability in the region, and give free rein to the militants operating in the valley. Without any semblance of control from Islamabad, they could turn Kashmir Valley into a veritable battle zone, the kind of which the Indian security forces have not yet seen.

Given current political trends, India's secular democracy is unlikely to be challenged by any alternate ideology. A swing towards the far right, though possible, is not probable especially after the drubbing of the right wing party BJP in the 2004 general elections. Having said this let us take a closer look at the scenarios:

Scenario 1: Inferno in Paradise

This scenario is a combination of a more Islamist Pakistan and a non-equitable India. Here both countries are struggling for their own existence. Rampant protests against the state are a common feature. The radical Islamists openly challenge Islamabad's authority. In India, economically disenfranchised groups like the Maoist guerrillas, splinter groups from Bihar and UP challenge Delhi's authority with impunity. The battle over the economic pie spills over to West Bengal and the North Eastern States. Indian states demand more financial autonomy and the federal division of financial powers is called into question. Delhi is busy quelling internal disturbances and the Valley is flooded with militants who are no longer in Islamabad's control.

Domestic compulsions in both countries make respective governments insecure. They do not want to make any move that would be construed as sellout. Integrative bargaining suffers. According to the modes of conflict management²⁴, either of the states could choose *avoidance or compromise* as strategies during the negotiations. Kashmiri separatists, sensing this, try to get the maximum mileage and step up violence. US, UK and other powers seeing the state of hopelessness rush troops in. All the parties get sucked into a spiral of violence, which refuses to abate. A nearly disintegrating Pakistan and a weak central government in Delhi cannot stem the domestic disturbances. Seeing this, radical Islamists from Pakistan up the ante and reframe the economic crisis in India as one in which the substantial number of Muslims have suffered for generations. The faultiness of economic inequity transform into religious fault-lines – challenging the very foundation of the India state.²⁵ The Islamists from Pakistan seize the initiative by pilfering nuclear technology. A stretched Pakistani army fails prevent the transfer of this lethal technology to the terrorists' hands. In a moment of vendetta, a splinter terrorist group detonates a bomb in Mumbai killing million in a stroke sparking off a conflict with apocalyptic end-states.

As a solution to such a crisis, both Pakistan and India should call for third party mediation and should request direct involvement by the US. It is imperative in a state like this that all nuclear assets are secured on the ground while at the negotiating table a solution is sought by carving out a separate state of Kashmir. A Marshall Plan type of arrangement could be thought of to bring about economic regeneration in the subcontinent as a whole.

²³ For an understanding of the potentially divisive impact of inequality see Sengupta 2005. 'India Boom Widens Cracks in Social Structure', *International Herald Tribune, Paris, Jan 20, 2006*.

²⁴ For details, see Saner 2005.

²⁵ See Kohli 1990 for details.

Scenario 2: Uneasy Calm

In this scenario we see an equitable and hence, confident India dealing with an Islamist and hence insecure Pakistan. Steady economic growth with effective redistributive policies brings unprecedented prosperity to the Indian populace. The country's primary agenda is to keep the growth going and Kashmir gets pushed to the backburner. There could be two distinct possibilities in this scenario. A confident India could mean a sizeable number of hawks in the establishment eager to craft a final solution to the Kashmir question. In that case, negotiations could drift towards the distributive bargaining zone with India choosing a competitive strategy. Sensing a weak Pakistan, India could violate its long-held restraint of not crossing the LoC (line of control). A few rapid military moves might follow as India might try to control as much territory as possible to get superior bargaining leverage at the negotiation table. Again, given this scenario, India would use time delaying tactics and arrive at the negotiating table as late as possible.

A conventional military move might degenerate into a non-conventional (nuclear) response from a shaky Pakistan. A first strike might mean an even more lethal second strike by India virtually signaling Mutual Assured Destruction (MAD).

To defuse such a scenario, Pakistan should internationalize the scenario as soon as possible. The problem would be an Islamist Pakistan with which the West would not like to engage. However, given the potential for a dangerous flare-up it may put men and material on the ground to keep the status quo of the LoC going. In this scenario the Indian security forces' stranglehold on the valley would continue in spite of the world community and human rights organizations censuring India.

Scenario 3: ISI, I Said

This scenario is the reverse of the 'Uneasy Calm.' Here tables turn on India as internal contradictions due to poor redistributive policies weaken it internally. Pakistan on the other hand remains a confident state in spite of its decades old military dictatorship. Low Islamisation gives Pakistan a new found respectability in the international arena. The Allied victory in the WoT gets attributed largely to Pakistan's support. Foreign aid flows in, business booms and Pakistan is on its way to becoming a nation state with a semblance of coherent identity.

India's poor redistributive record puts enormous strain on its federal polity and coalitional arrangements at the centre collapse. The government looks for a scapegoat to divert popular attention and finds one in the ISI. Anti-Pakistan rhetoric reaches a crescendo and Indian security forces let loose a reign of terror in the Valley. Being in a position of relative weakness, the best case scenario for India would be to use the avoidance strategy.

For Pakistan and the international community it would be imperative in such a situation to introduce CBMs and help shore up its flagging economy. The World Bank and the IMF might be in a position to help. India might do well to swallow its long-held pride and work towards fixing the economy. A weak India might be a blessing for Kashmiris as they would then be in a position to extract sizeable concessions and might even bargain for full independence.

Scenario 4: Paradise Regained

This is the ideal scenario where both India and Pakistan are at their assured best having sorted out their internal troubles. It is a scenario in which bilateral business links could

grow along with CBMs. Increased people to people contact and business exchanges between the two countries erase half a century of ill-feelings.

This is the most opportune time to talk Kashmir. In a calm and reasoned way the three parties can move toward an integrative bargaining zone where sharing and understanding each other's concerns would yield a solution that is win-win for all. Through the CBMs and bilateral exchanges, India and Pakistan could work toward a better economic cooperation within the framework of the South Asian association for Regional Cooperation, SAARC (Dhand 2005). Economic prosperity could help alleviate poverty, infant mortality and malnutrition in a region notorious for one of the most abysmal performances on HDI parameters.

BARGAINING STRATEGIES AND TACTICS

Across the scenarios presented we see the possibility of moving along a spectrum that has integrative and distributive bargaining at opposing ends. Let us examine scenario one, *'Inferno in Paradise'*. This scenario is a mix of a socially inequitable India and a more Islamist Pakistan. By definition this is a scenario in which both parties are preoccupied with domestic compulsions. The central government's authority is under threat in both lands. As a result, integrative dimensions of the negotiations suffer. A vicious cycle ensues with both parties increasing the rhetorical pitch and thereby choosing competition over cooperation. This could be the scenario that needs third party mediation the most.

In *'Uneasy Calm'* a more Islamist Pakistan meets a socially more equitable India at the negotiating table. There is a sense of power asymmetry, which sets the tone for the discussion. India, surer of its internal political dynamics, should be in a position of offering the olive branch. On the scale of competition—cooperation, Indian moves, ideally should be in the zone of cooperation. For Indian leaders with enhanced political legitimacy, any political move would be easier to sell to the electorate. In spite of power asymmetry this may be a condition in which both countries could do business.

'ISI, I said' is a state where the tables turn. A more confident Pakistan meets an under confident India at the negotiating table. India's fractious politics come to play here. So does the lack of internal consensus on external affairs. In an effort to score political points various stakeholders in Indian polity adopt a less accommodating option. The ruling coalition (given the current unlikely return of a single party majority the return of a single party majority at the polls seems highly unlikely) does not want to be seen as the government that 'sold out' to Pakistan. The tactics would certainly move toward adopting a competitive stance much to the detriment of the talks in question. This scenario, along with the above mentioned one, are not ones in which third party mediation could be introduced.

In the scenario *'Paradise Regained,'* integrative bargaining has the brightest chance to succeed. Both countries, being sure of their ground, could meet in an atmosphere shorn of mutual distrust. A deal, however basic it might look, would have a greater chance of gaining internal legitimacy. In this scenario the ZOPA would be wider giving both parties a chance to engage in meaningful, result-focused talks.

CONFLICT MANAGEMENT: AN INDISPENSABLE SKILL IN A FRACTIOUS WORLD

Political dynamics in the modern era across nations provide a picture of an increasingly fractious world. The multitude of opinions and an increasing assertion of regional/ethnic identities warrant skilful management of political demands from whichever quarter of the polity they arise. Modern leaders ignore the acquisition of this skill at their own peril. The

protracted conflict between Turkey and Greece over Cyprus is a stumbling block for Turkey's induction into the EU. The adoption of a competitive stance by definition rules out cooperation, which is becoming increasingly indispensable in a globalized world. The art of conflict management can be applied to conflict situations across ethnic, regional, business, trade and a plethora of other contexts. As always, it provides the stakeholders with the wherewithal to deal with conflicts and hopefully arrive at an amicable solution. Taking recourse to confrontation seldom solves a problem. The vanquished from one skirmish usually live to take the battle to the enemy camp someday. With due respect to the proponents of the first strike strategy, in a nuclear standoff one can provide a counterpoint that in the end there is no victor – only mutual assured destruction.

CONCLUSION

'Paradise Regained' is a utopian scenario. However, it is the desired end-state for the parties in the Kashmir dispute. The Indian subcontinent is a region with a history of famine, genocide, deprivation and destitution. On the other hand, it is the historical seat of an ancient civilization rich with priceless heritage. The Kashmir Valley with its unique tradition of art, literature, and tolerance has a legacy that evokes admiration.

The only way the region could regain its lost glory is through negotiation in which all parties treat each other with respect and trust—a tall order given the current vitiated atmosphere. Both Cyprus and Kashmir show us that the end to a malignant conflict cannot be achieved by bearing arms or by pursuing a strategy of confrontation. Only when the collaborative dimensions of the negotiations come to the forefront, leading to a mutually acceptable agreement, can we expect to make some headway in protracted conflicts of our times.

ANNEXES

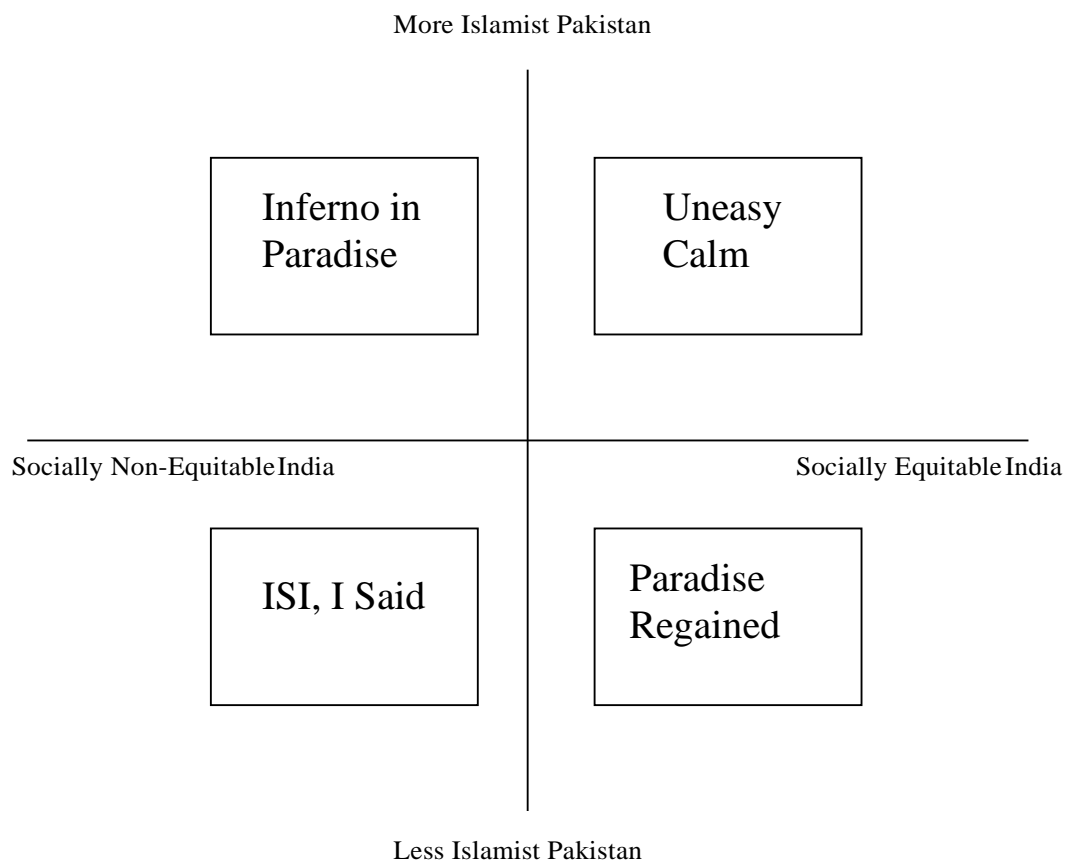


Table 1
Kill rate in case of a full blown nuclear attack.

<i>City</i>	<i>Total Population within 5 km of Explosion</i>	<i>Killed</i>	<i>Severely Injured</i>
India			
Bangalore	3,077,937	314,000	175,000
Bombay	3,143,284	477,000	229,000
Calcutta	3,520,344	357,000	198,000
Madras	3,252,628	364,000	196,000
New Delhi	1,638,744	176,000	94,000
Pakistan			
Faisalabad	2,376,478	336,000	174,000
Islamabad	798,583	154,000	67,000
Karachi	1,962,458	240,000	127,000
Lahore	2,682,092	258,000	150,000
Rawalpindi	1,589,828	184,000	97,000

Source: Nayyar and Ramana 2004

Figure 2

*Missile Delivery Systems***Nuclear-Capable Ground-Launched Ballistic Missiles, 1999***

<i>Missile Type</i>	<i>Range (km)</i>	<i>Inventory/Status</i>	<i>Configuration and Payload</i>
<u>India:</u>			
Prithvi-I (Army)	150	75	1-stg, liquid, 800 kg
Prithvi-II (Air Force)	250	25 ordered	1-stg, liquid, 500 kg
Prithvi-III (Navy?)	350	R&D	1-stg, liquid, ? kg
Agni-I	1,200-1,500	superseded	2-stg, one solid, one liquid, 1000 kg
Agni-II	2,500	6?	2-stg, both solid, 1000 kg
Agni-III	3,000 plus	R&D	3-stg, 2 solid, 3 rd fuel/payload unknown
<u>Pakistan:</u>			
Hatf-2**	300	in production	1-stg, solid, 500 kg
Hatf-3	600	in production	1-stg, solid, 500 kg
Shaheen-1**	750	in testing	?-stg, solid, 1,000 kg
Ghauri-I**	1,500	in testing	1-stg, liquid, 500-750 kg
Ghauri-II	2,000-2,300	in testing	1-stg, liquid, 700-1,000 kg

**Sources: Rodney W. Jones and Mark G. McDonough, Tracking Nuclear Proliferation: A Guide in Maps and Charts, 1998, op. cit., Section 10, "Missile Proliferation", including charts, pp. 253-269, and missile sections and their notes in the chapters on Pakistan, India, China and North Korea in the same volume; The Military Balance 1999-2000, London: International Institute of Strategic Studies (IISS), Oct. 1999, Table 53, pp. 307-311, and Table 19, p. 156-158; India Today International, April 26, 1999, pp. 28-30; and Pakistan Institute for Air Defence Studies, website page on "Pakistan's Missile Systems," <<http://www.piads.com.pk/pms.html>>. For general analytical background on ballistic missiles, see Aaron Karp, Ballistic Missile Proliferation - The Politics and Technics (New York: Oxford University Press for SIPRI, 1996). ** The Military Balance, op. cit., p. 158, suggests that the Hatf-2 and Shaheen-1 are based, respectively, on China's M-11 and M-9 designs, and the Ghauri-I on the North Korean No Dong missile, while a Ghauri-III multi-stage, liquid-fueled, 3,000 km missile reportedly under development is based on the Taepo Dong.*

*Figure 3**Aircraft Inventory*

<u>Nuclear-Capable High-Performance Strike Aircraft, 1999</u>			
<i>Aircraft Type</i>	<i>Combat Radius (km) (inboard fuel tanks)</i>	<i>Inventory</i>	<i>Supplier</i>
<u>India:</u>			
Su-30 MK	1,200 km	30	Russia
Mirage 2000H/TH	750 km	35	France/UK
Jaguar S(I)	550 km	88	France/UK
MiG-27	250 km	147	Russia
<u>Pakistan:</u>			
Mirage IIIEP	600 km	16	France
Mirage 5	650 km	52	France
F-16 A/B	950 km	25	US

Note: Aircraft combat range is variable, depending on armaments configuration and payload weight, and on flight profile. Combat radius estimates given here are nominal and assume within-normal armament payloads, no external fuel tanks, no air-to-air refueling, and high-low-high flight profile. Maritime attack, reconnaissance, and transport aircraft, some of which would be nuclear-capable over land and which would expand the Indian delivery capability against coastal targets far more than the Pakistani, are excluded from this table. Also excluded are high-performance fighter-interceptor aircraft that could participate in nuclear delivery or ground attack. Current numbers are drawn from *The Military Balance 1999-2000*, op. cit., sections on armed forces of India and Pakistan.

Source: Jones 2000

Figure 4

The Map of Kashmir



Source: University of Texas Library

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A TRILATERAL NEGOTIATION BOLIVIA, PERU & CHILE

Juan Pablo Valencia

ABSTRACT

The tense relations between Bolivia and Chile over the last century have evolved into a complex international dispute. The current diplomatic relations between Bolivia, Peru and Chile highlight the importance of a good negotiation or, as this case demonstrates, the problems arising from the lack of a good one.

This chapter analyses the possibilities available to the actors, their margin of maneuver, and the possible consequences of their behavior in a negotiation process. It illustrates the opportunities for the actors if there is a successful negotiation process, but moreover it shows the consequences in the short and medium term if negotiations remain once again a frustrated attempt.

A possible success in this trilateral negotiation process could be used as an example for the international community and would finally give an end to the only remaining border conflict in the region.

INTRODUCTION

During the Twentieth and Twenty-first Centuries, Bolivia and Chile have had intermittent and conflictive diplomatic relations. Even today, both nations have difficulties in trade and political relations. This tension stems back to a process originating from an armed conflict in the Nineteenth Century from which Bolivia has taken a position of revindication regarding territories lost in that war, and Chile has taken the attitude that there is no pending matter to negotiate. In this regard, it is equally important to note that Peru is also a preponderant actor in the conflict. Resolving this problem once and for all is important not only for the three nations involved but for all those of the region as well, since regional stability and progress now could depend upon it.

THE CONTEXT OF 1878

Comparing maps of the South American coast in 1878 with present-day maps, one sees that:

- a) In the 1800s Bolivia possessed maritime territories between southern Peru and northern Chile.
 - b) Peruvian territory was the largest and on the South its sole border was with Bolivia and not with Chile.
 - c) Chilean territory was smaller and lacked a border with Peru.
- (See Annex Figure 1)

The Development of the War

Prior to 1878, a series of impasses occurred between the Bolivian and Chilean governments about taxes on the export of minerals from the border region of the two countries on the Pacific Ocean coast. At the same time, Peru had tried to intervene as arbitrator between

Bolivia and Chile pursuant to a treaty of Confederation between Bolivia and Peru then in effect. In spite of Peru's well intentioned participation, the negotiations were stalled when the Chilean Government decided to declare war on Bolivia and Peru. Bolivia and Peru lost in that conflict, Chile won.

The following were the results of the war

- a) Bolivia lost territories that had given it access to the sea. This was made official in the Treaty of 1904. Said territory passed to Chile.
- b) The Peruvian territory of Tacna and Arica would remain in Chilean hands for ten years pending a plebiscite on whether they would go to Peru or Chile.

What is certain in the case of Peru is that Tacna returned to Peru. However, a plebiscite about Arica never took place, so this territory remains in Chilean hands until today. Peru maintains a firm will to recover that territory from Chile.

As a result of the war, Bolivia insistently seeks a revision of the treaty on geographic boundaries, in hopes of recovering its maritime status. At the same time, Chile has folded its arms regarding the signed treaty. Peru's claim on Arica persists in the country's collective mentality. Relations between both countries have experienced more lows than highs, but not to the extreme of relations between Bolivia and Chile.

Later Relations

Following the war and the signing of the peace treaty between the losers and the winner, Bolivia launched a diplomatic offensive to recover the access to the sea that it lost in the war, even though this meant cutting the territory won by Chile in two, given that Chile had also won land from neighboring Peru. Therefore, Bolivia decided to focus its diplomatic offensive on the ceding of Arica.

When Bolivia's diplomatic offensive was about to bear its first fruit, in a treaty under the auspices of the United States Peru opposed the ceding of Arica, since that had once been its territory. The outcome was the Treaty of 1929 between Chile and Peru, specifying that there could be no ceding of said territory without the consent of both parties. This closed Bolivian chances for the port of Arica, since it is unthinkable that Peru would cede a territory upon which it still has hopes to recover. The treaty is known as the "Padlock Treaty." In spite of this, Bolivia's offensive against Chile continues until today, and has caused more than one break in diplomatic relations between the two nations.

This situation has been aggravated by other events, such as the diversion of water from a Bolivian source that sends water to Chile. The north of Chile (in the past, Peruvian and Bolivian territory) holds the Atacama desert, the driest region of the world. Consequently the need for water in this region is vital for human survival. The Bolivian border region, however, is rich in fresh water and in underground sources. This conflict, called the "Silala Waters," remains until today and has caused Bolivian-Chilean relations to chill even further. Relations have reached such a low point that Chilean territory bordering Bolivia is seeded with landmines.

At present, the exploration of hydrocarbons in Bolivia has placed this country with the second biggest reserves in South America (following Venezuela). These discoveries have opened new possibilities for the sale of Bolivian energy products to such markets as the United States, but Bolivia being a landlocked country must use a Chilean or Peruvian port. Five years ago, Chile and Peru tried to sell their proposals for use of their ports to

Bolivia. Nothing came of the negotiations. It must be noted that Bolivian public opinion joined with fierce social manifestations put a quietus on signing a deal with Chile.

Meanwhile, Chile has an energy deficit forecast for coming years and currently buys gas from Argentina. Chile, therefore, has shown willingness to buy Bolivian gas, met with a stern “No” from the government in La Paz. The confrontation about this matter has reached such a chill that in 2003, when Argentina experienced a temporary energy crisis that impeded it from fulfilling promises to sell gas to Chile, Bolivia took the occasion to stop supplying gas to Argentina with the theme of “not a molecule of gas for Chile” – alluding that Bolivian gas would go to Chile via Argentine sales.

Analyzing Peru-Chile relations resulting from the Arica territorial dispute, an unresolved question remains: the maritime boundary on the Pacific Ocean. It is certain that each country considers a marine surface of some 30,000 square kilometers as theirs. Neither country has changed positions. Both countries are very aware that this could cause a serious war conflict because of the warships in the area.

Add to this situation the war between Peru and Ecuador in the 1990s. Peru accused Chile of having aided Ecuador with arms and logistics for the confrontation. Chile denied such accusations. Nevertheless, this is just another episode to be settled in the history of tenses relations between both countries.

In the case of Bolivian-Peruvian relations, although the treaty of confederation in the Nineteenth Century no longer exists, both nations have enjoyed much more open and close relations between them. On repeated opportunities Peru has expressed solidarity with the Bolivian maritime cause. During the 1990s, Peru even exorbitantly offered Bolivia the use of port facilities at Ilo. Even so, Peru has not proven to be efficient in aiding Bolivia in dealing with Chile, especially in regards to opening the padlock on Arica in the 1929 treaty. Unfortunately, the port of Ilo is too far from Bolivia’s economic mainline, and until now it has not been of great use. In the international arena, though, Bolivia and Peru have had joint actions, an example being their opposition to the candidacy of the Chilean Insulsa as Secretary of the Organization of American States. Trade and diplomatic relations between Bolivia and Peru are normal, and could even be called optimum in somefields.

Trade relations between Peru and Chile are disheartening, reaching only 4% of their total exports. Diplomatic relations have not dropped to equal the lows of Bolivian-Chilean relations, but they have not been strong, either. Many Chilean firms disposed to invest in Peru have confronted corruption and legal tangles that have blocked trade relations between the two countries.

Trade relations between Bolivia and Chile are not significant, and in fact reach only 2% of each country’s exports. It is certain that many Chilean companies that have tried to invest in Bolivia have faced obstacles arising above all from social and political rejection toward Chile.

It should be noted, however, that the port of Arica stays alive thanks to Bolivian commerce. It is the main port that Bolivians use on the Pacific Ocean. Numerous projects have been installed by the Chilean Government has instigated numerous development projects in the region targeting Arica’s growth, but none has panned out. In fact, the only thing that has helped the development of northern Chile is Bolivian exports. The result is an ironic economic dependence of northern Chile on Bolivian exports.

Years ago the Bolivian Minister of Foreign Affairs proposed making Arica tri-national. This proposal lacked the necessary support by Bolivia and other countries. Another interesting point is that during the Twentieth Century Chile has known how to

keep Bolivia's hopes alive vis-à-vis Arica, thereby dividing Bolivia and Peru on this matter. For Chile is convenient that these two neighbors do not form a joint front.

ACTORS

Bolivia

Since the end of the war Bolivia has sought to restore its status as a maritime nation, seeking a return of land from Chile. Bolivia's offensive can be described as diplomatic war¹, and has included the tactic of denunciation at international fora so as to begin multinational negotiations with Chile under the auspices of an international body. Likewise, Bolivia has the energy resources that Chile needs. These have served in recent years to put pressure on Chile to negotiate without excluding the matter of the sea.

Bolivia needs an outlet to the sea for trade purposes. It is considered the energy giant of America, but due to its geographic limitation it has not been able to develop this power. It is vital for Bolivia to negotiate an outlet with Chile while keeping Peru happy.

Bolivia's weaknesses are mainly poverty and political instability. Nevertheless, in spite of this instability, the sole constant factor in Bolivian foreign policy has been maritime repossession.

Chile

Until now has been adamant in having nothing to negotiate with Bolivia and Peru. Nevertheless in recent years this has changed due to Chile's energy crisis and also due to Bolivian and Peruvian political and social unrest that have prejudiced Chile's international solvency and affecting regional stability. In the most recent attempt at negotiations between Bolivia and Chile, the pressure was such that the Santiago government decided to begin a dialogue without excluding the maritime matter. It is likewise vital for Chile to maintain its territory in one piece. Finally, it is extremely important for Chile to increase economic activity in the north, that is to say Arica. That can only take place with the cooperation of Bolivia and Peru around the borders.

Peru

It is of vital importance for Peru to avoid renouncing its claim on Arica. It cannot consider permitting Arica to be granted to Bolivia as that would imply a renunciation of the claim. Likewise, the economic development of that southern region is essential to Peru.

THE ZONE OF POSSIBLE AGREEMENT (ZOPA)²

Bolivia's ideal would be the ceding of sovereignty over Arica. The minimum would be to deal not for sovereignty but something that involves many advantages, such as those addressing taxation and trade of Bolivian products. The sale of gas and the possibility of exporting gas through the Chilean port of Arica are negotiable, above all because now with Bolivia's nationalization of hydrocarbons, foreign companies that had a choice among ports

¹ Saner R. *The Expert Negotiator*, Koninklijke Brill NV, Leiden, The Netherlands, p. 43.

² Saner R. *The Expert Negotiator*, Koninklijke Brill NV, Leiden, The Netherlands, pag. 42.

to use now have their hands tied. This is a decision only of the Bolivian Government, and is a good card to play in negotiations.

In *Chile's* case, the most to negotiate is simply the purchase of Bolivian energy without any conditions regarding Arica. The least would be to deal about a trade zone with Bolivia in Arica that maintains the region's economic viability.

Peru's maximum idea would be to deal on the devolution of Arica. The minimum would be to negotiate some sort of concession that ensures Peruvian presence in Arica, and which also opens trade and development in its southern area.

An Analysis of ZOPA

The three countries' most extreme positions demand total sovereignty over Arica. This is not compatible, as it would mean a zero sum game among the three negotiators, given that two would necessarily lose (See figure 2 in the annex). This distributive negotiation is not an option, as all three countries can place significant pressure on the dealings.

A common position between minimum and middle exists among the three – of enjoying some type of presence in Arica, primarily linked to trade terms. This could be the point of contact for negotiations, as it would imply that some would have sovereignty and others could enjoy another sort of presence (specifically, commercial presence) in the area. This means that an integrative deal could be reached.

What is lost if there is no negotiation

Under this heading one must mention that the situation can remain in *status quo*, as it has until now with nothing changing in more than a century. It is also certain is that a change in the balance of power is remote. In any event, what can be lost is based in economic terms. The border region shared by the three enjoys scant economic development, and a new integrationist dynamic is needed to change this. The lack of negotiations or a *status quo* can postpone the area's population progress for many more years. At the same time one must underscore that this conflict causes instability in the region and has ceased being merely a tripartite problem. One proof of this is the interventions by presidents of other nations in the matter, for example Venezuela and Brazil. On the other hand, Bolivia's stance of not selling a bit of gas to Chile can result in conflicts with third countries, such as Argentina. Bolivia evidently needs an outlet to the sea to export its goods, and above all to sell gas in the future. If not, Bolivia's development would be hindered for several more generations.

Chile's energy deficit makes negotiations necessary, or the future economic viability of the country could also be at play since other suppliers of energy do not exist nearby. Chile's only option is to deal with Bolivia. If negotiations do not prosper, then Peru's claims to Arica probably would not prosper. Likewise the economic postponement of its southern territories is at play. What is certain is that these countries cannot continue paying the costs of paralyzed dialogue that until now have led nowhere. Now more than ever, with world globalization, the three must sit down and negotiate once and for all.

STRATEGY

It is important for Bolivia and Peru to be present in Arica. For Chile it is important to preserve its presence in Arica and to solve that country's energy crisis. The region's economic development is important for all three.

Analysis of the various tactics

On a couple of occasions in the Twentieth Century Bolivia tried to start bilateral negotiations, but Chile did not take the bait. Later the tactics assumed were to try to get negotiations going through international bodies. This obliged Chile to at least make a statement to the effect that no pending matters existed between the two countries.

In some cases the Santiago government expressed a will to reinstate diplomatic relations with Bolivia. Likewise, as already mentioned, Bolivian propaganda on an international level has caused that even within Chile artistic displays existed in favor of Bolivia. This propaganda tactic on an international level has turned out beneficial for Bolivia due to the fact that even though concrete results do not exist, at least an understanding and generalized international concern exists about the conflict and, to a certain point, there is international sympathy for Bolivia.

The Chilean position meanwhile, to deny that conflict – assuming that no conflict exists and that the international community cannot intervene – also is a tactic that should be analyzed. The harshness of the Chilean position regarding this denial has been a very useful tactic by Chile, since it has allowed Chile to maintain the *status quo* for over a century, a period that has served it to maintain a constant pace of growth and achieve political stability simultaneously.

In this, if it were not for the Bolivian demand to take Chile to international negotiation, Chile would not even have recognized the existence of a conflict. It is fair to say that the extreme polarization of both demands – the multilateral or the non-existence of a conflict – have brought to the concrete intermediate stage a possible bilateral negotiation accepted by Chile at some time, without excluding the matter of the sea from the agenda. (See Annex Figure 2).

Positive negotiation could result from these two positions and draw the two sides closer, and include Peru. The Bolivian tactic to use gas as a means of applying pressure on Chile to sit at a negotiating table is perfectly valid and positive. One could say that it has been a combination of the tactic to make the conflict international added to the Chilean need for gas that has opened the possibility of dialogue without exclusions.

Chile has used, in the matter of gas, a very interesting tactic: the formation of an energy ring between Brazil, Argentina, Venezuela and Chile to make the region self-sufficient. At the moment of creating this agreement, Chile was one of its main proponents. Certainly, other countries count on Bolivia's presence in such an agreement since without Bolivia the ring would not be viable. The point is that Chile has entered a regional group that could put pressure on Bolivia to relax its position about gas so as to safeguard regional energy stability. This tactic has proved positive for Chile since it has drawn it closer to its goal of Bolivian gas.

Peru's tactics cannot be analyzed. Its claim, while latent in Peruvian society, only springs to life when Bolivia draws closer to Chile. The Peruvian tactic is opposition to the ceding of Arica to Bolivia, based on the "Padlock Treaty" of 1929. This tactic has also served to keep the territory in dispute so that it does not cease to be a claim for the Peruvians. This tactic is valid for preserving a *status quo*, but one must see if it really serves Peru's interests.

ANALYSIS OF THE POSSIBLE SCENARIOS

Although the probabilities are slim, one must study the case in which Bolivia and Chile were to negotiate at a multilateral level. The possibilities for dialogue sponsored by the

United Nations remain on the table. The U.N. Secretary General invited both sides in the conflict to talks. However, a concrete proposal does not exist for the method to be used, and this even could lead to another conflict about the method (arbitration, mediation, etcetera) as the parties might be at an advantage or disadvantage. Even the mere selection of method to be used could take several years, hence, not recommended because of the time involved.

In the event of a bilateral negotiation this must be without exclusion of the maritime matter, or one runs the risk that everything could again be paralyzed. Thus, this bilateral negotiation could not really be “bilateral” since Peru’s presence is necessary, making it a trilateral negotiation. In such a case the possibilities that a Tri-national Arica plan prosper are great so long as the parties structure it in a coherent manner. From this agreement would come commercial advantages for the three countries. The matter of a tri-national Arica would merit another chapter of study not related to the negotiation, but to economic factors.

In any event Bolivia has gas to negotiate. Chile has real estate to negotiate and Peru holds the key to the padlock to negotiate. A tripartite agreement about Arica would be the best solution for the problems of the three.

NEGOTIATION CONDITIONS

Unfortunately, given the nature of the matters to discuss, it will be quite difficult or almost impossible for the negotiations to be carried out by persons holding full powers, so that one can predict that any negotiations will take a long time. Simply put, it is impossible for the present democratic regimes to cede power to a person to negotiate the commercial sovereignty of a territory (in the case of Chile), so that such negotiations surely would require congressional approval and many consultations with the executive power.

Matters like the sale of gas through Chilean territory, in the Bolivian case, will also be matters subject to congressional approval and with executive coordination, and probably with the very civil society itself. The same rules apply to Peru to those for Bolivia and Chile about consultation and congressional approval. The result is that none of the countries could send persons with full power to negotiate, which must be understood from the beginning.

Equally important, there is a lack of confidence among the parties. Given this, the parties would need to make efforts to construct confidence that has been lost over more than a century of failed attempts.

CONCLUSIONS

One can carry out negotiations of an integrative type among the protagonists of the conflict, when all actors are in positions to give and to receive. Certainly, in this case the parties possess resources that the others desire and this implies that all are in conditions to give and to receive. For the actors, everything could boil down to a give and take.

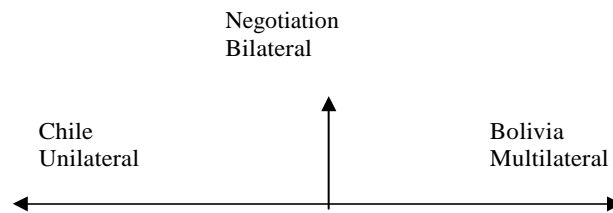
The strategies for each of the actors are clear. According to the analysis proposed, the actors have various cards for dealing and/or applying pressure on the other parties, however the choices available for maximizing benefits are not many. Actors must necessarily give something in order to receive what they want. Concurrently there are no actors in disadvantage of resources, they all have something to offer and all have something the others want. It seems, however, that no one wants to be the first to give.

Certain actors seem to seek to maintain the *status quo*. The tactics used until now have given much hope in some cases. Chile and Bolivia have shown one way or another will to recommence dialogue. Peru however seems to seek bilateral negotiations or simply a *status quo*.

ANNEXES

Figure 1

QuickTime™ and a
TIFF (Uncompressed) decompressor
are needed to see this picture.

Figure 2

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AN ANALYSIS OF THE TAIWAN ISSUE

Zhang Lingzhi

ABSTRACT

The conflict between Chinese Mainland and Taiwan, existing for over fifty years, is increasingly sensitive, and becoming a major potential trouble-spot in East Asia. How to deal with this intractable issue has become an important factor that can significantly influence the region's economic and political development. The recent political and economic changes experienced by these countries have increased the magnitude of this conflict.

This chapter discusses the matter of Taiwan through the lens of the changing political environment in both Chinese Mainland and Taiwan. It describes the historical origins and the current situation of this issue. The concerns among the main actors are analyzed and some possible scenarios are presented accordingly. Finally, this chapter also illustrates the conclusion deduced from the analysis with perspective scenarios. It is obvious that the solution of this tension – which may range from war and depression to peace and development – will directly impact the future of this region.

INTRODUCTION

General Information on Taiwan: Geography

Taiwan is an island located in East Asia and adjacent to Chinese Mainland. They are separated by the Taiwan Strait. At its widest there is 180 kilometers between Taiwan and Chinese Mainland and 131 kilometers at its narrowest. Taiwan is 35,873 square kilometers with two thirds of the island comprised of mountains. China's Fujian province is directly on the other side of the Taiwan Strait.

General Information on Taiwan: Demographics

By the end of August 2002, the population of Taiwan was 22.48 million people. Han Chinese account for 98 percent of the population. The remaining 2 percent – about 430,000 people – are a minority people, who are regarded as the original inhabitants of Taiwan. They are divided into 12 groups each with different languages and customs.

History of Taiwan

The history of Taiwan can be traced back about 20,000-30,000 years. So far, the earliest humans found in Taiwan are Zuozhenren, whose remains were first found in Zuozhen village of Tainan in 1971. Recently, some animal fossils with artificial nicks and dating over 40,000 years by archeologists were found in the sea bed near the Penghu area. According to this evidence, archaeologists believe that there were human beings living near the Dongshan land-bridge which connected Taiwan Island with Chinese Mainland during Ice Age. Changbin ruins dating to the same period were that were found in Taidong. The distinctive jade-ware and corded pottery of the Changbin, Puyuma and Tapenkeng

(Dapenkeng) cultures show a marked diversity in the island's early inhabitants.¹ The stone implements found among Changbin ruins are very similar to the ones in southern China. But, because archaeological evidence is still insufficient, thus far it remains impossible to clearly establish a group of people to these ruins.

Taiwan is estimated by anthropologists to have been populated for approximately 30,000 years. Little is known about the original inhabitants, but distinctive jade ware and corded pottery of the Changpin, Puyuma and Tapenkeng (DaBenKeng) cultures show a marked diversity in the island's early inhabitants. Today's Taiwan's aboriginal peoples are classified as belonging to the Austronesian ethno-linguistic group of people, a linguistic group that stretches as far west as Madagascar, to Easter Island in the east and to New Zealand in the south with Taiwan as the northern most point. Austronesian culture on Taiwan began about 4,000 B.C ago, and DaBenKeng culture existing during Neolithic age is the origin of Austronesian culture in Taiwan. According to the mainstream viewpoint, Taiwan might be one of cradles of Austronesian².

Taiwan's historical records date from the Three Kingdoms Period (222-265 A.D.). A book entitled *Lin Hai Shui Tu Zhi* contained the earliest writings about Taiwan. It said that the emperor of Wu, Sun Quan, had sent ten thousand soldiers to Yizhou at that time. From 607 to 610 A.D. the Sui Dynasty had sent soldiers to Liuqiu three times.³ After AD 610, Han Chinese began to settle at Penghu. Many experts believe that Yizhou and Liuqiu are both ancient names for Taiwan, and some evidences of this can be found from some descriptions in *Lin Hai Shui Tu Zhi* and *Sui Shu - Liuqiu Zhuan*.

The Song Dynasty established a military base in Penghu in 12th century⁴ and the Yuan Dynasty built a political organization named Penghu Xunjiansi⁵ in Penghu around in 1281.⁶ The Ming Dynasty also established a Xunjiansi in Penghu around in 1563.⁷ These records show that Chinese dynasties on the Mainland had a close relationship with Taiwan for thousands of years.

In the 17th century, the Dutch entered Taiwan and turned it into a Dutch colony. In 1661, Zheng Chenggong, a loyalist of Ming Dynasty, led military troops and drove the Dutch out of Taiwan. Then the Kingdom of Tungning was established. In 1683, the navy of Qing Dynasty defeated Zheng's troops and the Qing Dynasty ruled Taiwan as a prefecture. In 1887, Taiwan became a separate Chinese province.⁸ Taiwan was transferred to Japan as a concession in 1895 when China was defeated in the first Sino-Japanese War from 1894 to 1895. Japan was compelled to give up the dominion after World War II. Then the Chinese government, which was ruled by the Kuomintang of China (KMT) at that time, took over Taiwan. As it became apparent that the KMT was losing the Civil War against the Communist Party of China (CPC), the CPC took control of the mainland and the KMT

¹ Wikipedia, www.wikipedia.org; and Council for Cultural Affairs of Taiwan, <http://web.cca.gov.tw/Culture/museum/anti/sec4.htm>

² The History of Taiwan, by Gao Mingshi, Hong Liwan, Zhang Yongzhen, Li Liyong and Wang Zhaowen

³ *Sui Shu - Liuqiu Zhuan*, an article about Liuqiu in the book named *Sui Shu* was written in Tang Dynasty.

⁴ *Wang Gong Xing Zhuang*, a book written in Song Dynasty.

⁵ Note: Xunjiansi was a grassroots organization of local governments during Yuan, Ming and Qing Dynasties of China. It was established for administrating some areas with low population density.

⁶ *Dao Yi Zhi Lue*, by Wang Dayuan in Yuan Dynasty.

⁷ *History of Taiwan*, by Zhuang Yongming, 1989

⁸ Wikipedia, www.wikipedia.org

moved the central government and military force to Taiwan. Just as Chinese Mainland was preparing to enter Taiwan with force, the Korean War broke out. With its involvement in the Korean conflict, the People's Republic of China's (PRC) opportunity to resolve the Taiwan issue by force was lost. The PRC government gave up its plan of military action, choosing instead to solve this issue by peaceful means after the Korean War ended. It is at that point that the current tension between Chinese Mainland and Taiwan took root.

SITUATION ANALYSIS

The Current Situation Regarding Taiwan

Since 1949, the regular link between Chinese Mainland and Taiwan Island has been cut off due to the political hostility. Both of the CPC and KMT claim that their governments each exclusively own the sovereignty of China, and consider each other as an illegal government. The CPC considers Taiwan Island as unliberated territory; on the contrary, the KMT considers Chinese Mainland as enemy occupied territory. The relationship between Chinese Mainland and Taiwan has improved with trade due to the PRC's reforms and its opening policy, resulting in a relatively harmonious environment between the two sides. This harmonious atmosphere was broken, however, when the KMT lost its position as ruling party and the Democratic Progressive Party (DPP) won the 2000 election. In 2002, Chen Shuibian, the current leader of Taiwan, publicly announced that the relationship between Taiwan and Mainland is "one side and one country"⁹ that negates the consensus of "One China"¹⁰ between the CPC and KMT governments. This led to a dispute among industries in Taiwan, Chinese Mainland and the United States. The relationship between Taiwan and Chinese Mainland is once again characterized by tension because of Chen Shuibian's tendency to openly promote Taiwan's status as an independent country. In his 2006 Chinese festival speech, Chen said that he would consider abolishing United Country policy, halting the work of the National Unification Council of Taiwan, and seek UN membership as Taiwan. This statement breached one item in the speech for his accession and was criticized by the Fanlan alliance¹¹. On 30 January 2006, the US State Department released a rare statement concerning this speech, in which it reiterated its policies toward Taiwan, including the "One China" Policy, the Taiwan Relationship, and the Three Communiqués. On 27 February 2006 Chen formally announced that the work of the National Unification Council would stop, and abolished the United Country policy. Chinese Mainland severely disapproved of these actions.

Since Chen Shuibian became the leader of Taiwan, the PRC has adjusted its policy on Taiwan clearly expressing that it does not exclude the use-of-force option in resolving the matter of Taiwan. As Chen Shuibian increases advocacy for a sovereign Taiwan, Chinese Mainland becomes more uncompromising with the continuously escalating movements. The situation between both sides is getting tenser and tenser and is becoming a destabilizing factor in the region. While there is the possibility of regional war with this current situation, neither side expects this to happen.

⁹ Press release issued by Taiwan government on August 3rd 2002.

¹⁰ Note: "One China" means there is only one China in the world; Taiwan is part of China, and the Chinese mainland is part of China as well. Source: *The Meaning of "One China"*, Adopted by the National Unification Council, Taipei, August 1, 1992

¹¹ Note: Fanlan alliance consists of the KMT, QinMin Party and Xin Party. These parties advocate "One China" instead of independence of Taiwan.

Actors & their Positions

Chinese Mainland and Taiwan are the main actors in this conflict. But, given the current political situation, Taiwan can be divided into two sub-actors, the KMT and the DPP. There is also the US – the third actor that concerns itself with this conflict.

Chinese Mainland

As the acknowledged successor of China's regime, the PRC believes that Taiwan is part of its territory and hence it has the right to recover the island at an appropriate time. Thus, the PRC announced that Taiwan has already been part of China since ancient times, and it is an inseparable part of the country. The PRC government has always maintained a strong position on the matter of Taiwan. Recovering Taiwan by force had been at the core of identified solutions for this matter until 1982 when the former Chairman Deng Xiaoping formally proposed the famous policy of "One country, two systems" for Taiwan, Hong Kong and Macao.

Since then, unification by peaceful means has become the driving concept in the PRC's Taiwan policy, and a lot of work has gone into it, including boosting the economic links between each side, enhancing communications, and seeking three direct links (direct postal, transportation, and trade links) across the Taiwan Strait. The relationship had begun developing in a favorable direction for the peaceful unification of China until the DPP's became Taiwan's ruling party. The DPP has taken many actions favorable to Taiwanese independence, which have made the central government of the PRC express strong discontent. There is growing support in Chinese Mainland, particularly among the military, to recover Taiwan by force. In a survey conducted in several major cities by Society Survey Institute of China (SSIC) in Nov. 2003, 97% of Chinese respondents support using force to recover Taiwan if Taiwan's current leaders declare independence. This result was strongly consistent with previous similar surveys. Although most Chinese people are unwilling to face to war, they are hard-liners with nationalism in Taiwan issue. Hence, the PRC government announced that it does not exclude the possible use of force in Taiwan. Needless to say this served to increase tensions further.

The PRC's proposed solution is "One country, two systems." This policy consists of four points:¹²

- *One China.* There is only one China in the world, and Taiwan is an inseparable part of China. The PRC's government definitely opposes any speech and behavior whose aim is to make China separate, including "Two China", "One China, One Taiwan" and any attempt of making Taiwan independent. There is not so-called self-determination by only Taiwanese instead of Chinese in solving the Taiwan issue.
- *Two systems coexisting.* Under the precondition of "One China", the Mainland retains its institution of Socialism, and Taiwan keeps its current institution. The two parts will coexist in a long term and develop together after the unification of China. Taiwan's institutions, life style, and economic and cultural relations with foreign countries will not be changed. Private property, other private ownership and foreign investment will be protected by law.

¹² The People's Networks, www.people.com.cn

- *High autonomy.* After unification, Taiwan will become a Special Administrative Region with the rights of administration, legislation, and independent jurisdiction, conducting final judgment and dealing with limited foreign affairs. Taiwan can even have its own military force. The central government will neither dispatch military force nor political officials to Taiwan. Taiwanese delegates can hold the posts in the central government and administrate national affairs.
- *Peaceful negotiations.* Through contact and negotiations, achieving national unification by peaceful means is the common wish of all Chinese. However, the PRC has no responsibility to promise to give up the use of force for any action that will lead to the separation of China.

Based on the above outlined policy, it is not difficult to see that Chinese Mainland's attitude towards Taiwan remains positive, firm and flexible. In other words, as long as Taiwan accepts the concept of "One China" over independence, everything else can be discussed and negotiated in an environment without limitation.

The PRC's Chairman Hu Jintao has stressed the feasibility of "One country, Two systems" on many occasions since his appointment. While he acknowledges that there would inevitably be some problems and contradictions in the implementation of this policy, he restated his belief that these could be solved on the basis of solidarity. He has also clearly expressed his position when Chen Shuibian announced abolishing the Guiding Principle for National Unification and halting the work of the National Unification Council. Both of these points are illustrative of his attitude toward Taiwan.

In the Report on the Work of the Government delivered on March 5th 2007, Wen Jiabao (Prime Minister of the PRC) restated, "We will unite with Taiwan compatriots in firm opposition to all forms of secessionist activities such as calls for Taiwan independence through legislation." This statement reaffirmed the consistent position of Chinese Mainland, and expressed its deep concerns about the activities towards national separation recently happened in Taiwan.

The KMT in Taiwan

The KMT is the former ruling party of "the Republic of China" (Note: Taiwan is the territory controlled by it now), and an important force on the Taiwanese political stage. As a party that ruled the whole of China (Mainland and Taiwan) at one stage, the KMT accepts the principle of "One China", although its position is different from that of the CPC. Opposing the establishment of a separate sovereign Taiwanese state is also its consistent policy. In the KMT's eyes, the Mainland is an enemy-occupied territory rather than another country. Hence, it does not reject national unification, and often takes steps toward seeking possible plans to achieve national unification.

On 23 February 1991, the Taiwan authority controlled by the KMT passed the Guiding Principle for National Unification during the third meeting of National Unification Council. This Guiding Principle states that "The unification of China is meant to bring about a strong and prosperous nation with a long-lasting, bright future for its people; it is the common wish of Chinese people at home and abroad." seeking to "together build anew a unified China." Its goal is "To establish a democratic, free and equitably prosperous China." Three processes were designed in this principle: "Short term--A phase of exchanges

and reciprocity"; "Medium term--A phase of mutual trust and cooperation"; "Long term--A phase of consultation and unification."¹³

With this Principle, the relationship between both sides of Taiwan Straits had gradually become closer and the possibility of peaceful unification also had become enhanced, although the actual work accomplished was insufficient to bring about national unification. This sound situation was smashed due to the first-ever replacement of Taiwan's ruling party. The KMT lost its hold on Taiwan, and its successor the DPP had a different perspective on national unification.

The KMT appeared to have adopted a more open policy on the issue of national unification. Lian Zhan, the former KMT leader visited Chinese Mainland several times, and met the CPC's leader as well as other politicians to discuss relative issues. These steps reopened the door to negotiation show the KMT's position of supporting national unification. This party has become an important force behind the process of unification.

The DPP in Taiwan

The DPP is a party strongly in favor of two distinct nation states: Taiwan and China. Since it came to power, it has taken a series of actions that push Taiwan away from unification. The current Taiwanese government does not accept the "One China" principle proposed by the Mainland. It states that "the ROC¹⁴ is a country with independent sovereignty" and "the future of Taiwan shall be determined by 23 million Taiwanese."¹⁵ The above viewpoints carve out a path to Taiwan's sovereign separation. Although the current government does not definitively express supporting independence, a number of its statements imply its position in opposition to that of the KMT and Chinese Mainland. An apparent difference between the KMT and the DPP is that the former accepts the concept of "One China" albeit with different explanations, while the later does not accept the basic underlying concept: National Unification. As a leader, Chen Shuibian has worked hard to push the Taiwan matter away from the unification principle. While this is evidenced by his suspension of the Guiding Principle and the work of the National Unification Council, these actions were opposed not only by Chinese Mainland but also by the KMT the European Union and the US, who often support Taiwan. The EU stated, "This decision is not helpful to maintaining stability and peaceful development in the Taiwan Strait." and "welcomes Taiwan's intention not to change the status quo".¹⁶ The US requested that the Taiwan government don't abolish the National Unification Council, and maintain the current situation.¹⁷

However, the DPP continues its actions favorable to independence without any change in position. Recently Chen Shuibian had a statement named "Four Wants and One

¹³ *Guidelines for National Unification*, Adopted by the National Unification Council at its third meeting on February 23, 1991, by the Executive Yuan Council (Cabinet) at its 2223rd meeting on March 14, 1991, and cancelled by the Executive Yuan Council at its 2980th meeting on March 1, 2006.

¹⁴ Note: The ROC is the Republic of China, the name of current regime in Taiwan.

¹⁵ *An Explanation to the Speech of Chen Shuibian in August 3rd, 2002*, by the National Unification Council of Taiwan, August 6th, 2002

¹⁶ *EU confirms Taiwan's clarification on ceasing NUC's function*, a newsletter of Taipei agency in Britain

¹⁷ *Taiwan - Senior Taiwan Officials' Comments on National Unification Council*, a Press Statement of U.S. Department of State, by Adam Ereli, Deputy Spokesman, March 2nd, 2006.

Without,"¹⁸ in which the independence concept is restated. Chen Shuibian's government has clearly demonstrated its position on this issue, which may only serve to complicate matters.

The United States

The US has been Taiwan's biggest supporter and opponent of Chinese Mainland since 1949. Its policy on Taiwan changed after formal diplomatic relations were established with the PRC. While not openly acknowledging a separate sovereign state, the US does not promote the unification of China either. This may be due to its global strategy, economic benefits and the ideological differences between it and the PRC.

With the end of the Cold War, the US lost its biggest opponent – the USSR. As a result, China became a potential concern of the US due to ideological differences and the rapidly growing Chinese economy. On the one hand, the US government appeals to the PRC not to use force or threaten Taiwan with force; on the other hand, the US still continues to sell weapons to Taiwan in accordance with the Taiwan Relations Act, which issued in 1979. It is clear to see that the US does not expect that there is a much stronger and unified China in Asia-Pacific region, because China will become the most important leading power in this region rather than the US if the national unification of China is accomplished.

During the Cold War, US general Douglas MacArthur referred to Taiwan as an unsinkable aircraft carrier. This statement reflects the importance of Taiwan in the US strategy of Asia-Pacific region. In fact, the US considers Taiwan as a military instrument and a perfect tool to handicap the PRC if necessary. Yet it also perceives Taiwanese independence as a dangerous political adventure to support, and it could unfold into many troubles. Therefore, the US's position is apt to focus on preserving the status quo.

Summary of Positions

Obviously, these main actors in the issue have respective ideas about the future of Taiwan. Distinct benefits and dramatic interactions make Taiwan issue become much complex and more uncertain. Thus, it is necessary to understand their respective viewpoints and positions when analyzing this issue and using a table about positions would be a good method to reveal the differences among the actors. According to their announcements and other relative actions, the relations of every side in this conflict can be illustrated in the following table:

Table 1: Position of every side on Taiwan (core issues)

<i>Item</i>	<i>Mainland</i>	<i>KMT</i>	<i>DPP</i>	<i>USA</i>
<i>"One China" Policy</i>	++	++	--	+
One China - the PRC	++	--	--	0
One China - the ROC	--	++	--	0
One China, One Taiwan	--	--	++	-
<i>Form of National Unification</i>				
Centralization	++	++	--	-
Federation	-	0	--	0

¹⁸ This was come up with in a speech at a function of the Taiwan Association for Public Affairs on March 4, 2007. Source: <http://www.mac.gov.tw>

<i>Item</i>	<i>Mainland</i>	<i>KMT</i>	<i>DPP</i>	<i>USA</i>
Confederation	--	--	++	0
<i>State Institution (in Taiwan)</i>				
Socialism	0	--	--	--
Capitalism	++	++	++	++
<i>Political Institution</i>				
Democratic Centralism	0	-	--	--
Democracy	+	++	++	++
<i>Military Force in Taiwan</i>				
Military Force from Chinese Mainland	0	--	--	--
None	0	--	--	--
Military Force of Taiwan with some limits	++	-	--	--
Military Force of Taiwan with no limits	-	++	++	++
<i>Autonomy</i>				
Low	0	--	--	0
High	++	++	+	0
Absolutely	--	+	++	0
<i>Economic Institution</i>				
Socialist Market	0	--	--	--
Free Market	++	++	++	++
<i>Freedom of Expression</i>				
With some limits	++	-	--	--
With no limits	--	+	++	++

Note: ++ strongly supporting, + supporting, 0 neutral, - opposing, -- strongly opposing. The order of items is in terms of importance of them.

According to the above table, we can find that positions of the Chinese Mainland government and the KMT are quite similar on some essential issues including the "One China" policy. On the other side the DPP and the US are more similar. The DPP's stance is very different from the Mainland's. Hence, there will tend to be two possible groups during negotiations. Certainly, their interests are mixed together. There are also economic and political interests between Chinese Mainland and the US, economic interests between Taiwan and the US, political interests between the KMT and the DPP, and the traditional relationship between the KMT and the US. The economic relationship between Chinese Mainland and Taiwan cannot be ignored either. The economic interrelations among Chinese Mainland, Taiwan and the US have been getting closer and closer since Chinese Mainland set about its economic reforms. Chinese Mainland became Taiwan's top trading partner in 2003¹⁹, and both of Chinese Mainland and Taiwan are also the very important trading partner of the US. Therefore, the real environment of negotiations will be very complicated due to complex political and economic concerns and there will be many changes during the dialogue process.

¹⁹ *Overview of U.S. Policy Toward Taiwan*, James A. Kelly, Assistant Secretary of State for East Asian and Pacific Affairs, April 21, 2004

CONCERNS, PREFERRED CHOICES AND THE "RESERVATION PRICE"²⁰*Chinese Mainland*

Territorial integrity is the issue of most concern for Chinese Mainland. Under the precondition of national unification, many things can be discussed in a flexible way. Certainly, the PRC government will always insist on "One China." It is maybe the Mainland's reservation price, and other forms cannot be accepted by the central government. Some detailed choices have been stated in its "One Country, Two Systems" policy. Chinese Mainland is confident of the national unification in a peaceful way as long as Taiwan doesn't announce its independence. Economic links between the two sides and the economic power of Chinese Mainland will be the most important decisive factors to achieve national unification, but it needs time. Additionally, the PRC believes the Taiwan matter is a bilateral problem concerning only Chinese Mainland and Taiwan, and there is neither need nor room for a third party, such as the US which is partial to those with the stance against the PRC.

Taiwan

The KMT would like to push the process of national unification due to its acceptance of a conceptually modified "One China," although it doesn't accept socialist institutions. Ma Yingjiu, the former KMT chairman said, "The policy of the KMT doesn't change. It is the most important to enhance communications and create conditions. So far it may be accepted by every side to maintain the current situation." This saying reflects the psychologies of most members of the KMT. Seeking unification and a political position equal to the CPC's in a unified country maybe the KMT's goals. In addition, it is also an important measure for the KMT to improve the relations between Chinese Mainland and Taiwan, because it is very helpful to enhancing its political influence in Taiwan Island.

The DPP's principle goal is to establish Taiwanese sovereignty and it does not accept the "One China" principle. Supports from the US and the Taiwanese population are the keys to realize its goal. But, the number of Taiwanese that support an independence policy is limited according to the newest public-opinion poll in December 2006. This poll finds that the proportion of respondents supporting independence immediately is 6.1%; supporting unification immediately is 2.2%; supporting to maintain the status quo is 85.5%; with the tendency towards unification is 14.7%; with the tendency towards independence is 23.6%.²¹ The results are quite similar to the outcomes of same surveys in previous years. Most Taiwanese believe that it is the best choice to maintain the status quo of Taiwan Strait. Therefore, the DPP recently took many actions to desinicize Taiwan, which included modifying names of companies and organizations, removing Chiang Kai-shek's²² statues and so on. Obviously, it wants to cut off the links between Taiwan and Chinese Mainland in culture and history, and prepares the ground for Taiwan independence. Now, realizing Taiwan independence through legislation has become the main approach adopted by the DPP. A proposed draft of "second republic constitution", i.e. so-called "Constitution of

²⁰ Saner, R.. *The Expert Negotiator* pp. 44,

²¹ The data was from the web site of "The Committee of Mainland Affairs in the State Department of the ROC", www.mac.gov.tw

²² Note: Chiang Kai-shek was a former President of the ROC.

Taiwan", was made public on March 18th 2007. It shows that "Taiwan independence through legislation" has been put into practice. According to its guide principle and actions, accomplishing Taiwanese independence should be its ultimate goal without any compromise.

The objectives of these two parties are two important choices in future negotiations. The goal of the ruling party in Taiwan will have an obvious impact on the negotiations process.

The United States

Generally, the US adopts an oblique policy, i.e. not directly recognizing or acknowledging who shall hold the sovereignty of Taiwan Island. This policy was developed on the basis of the US's global strategy and for its national interests.²³ Under this policy, the USA therefore provides "limited support" to Taiwan's government. This action established a barrier for the unification of China and led to a strong tendency of Taiwan independence. In recent years, because the economic relationship between Chinese Mainland and the US has been getting closer and the position of the US on the matter of Taiwan has changed slightly. As a result, the future actions of the US are not very clear with respect to this issue. Evaluating its interests in Taiwan, the US does not seem to be a driving force for the national unification of China. Maybe ideological considerations and its national interests are still its main guides. Taiwan's security will be its primary reason for supporting Taiwan's defense and even intervening by force, although the US may not really care.

Concerns among the actors

The relations among these actors are very complicated. The following chart, figure 1, illustrates the complexity. As typical multilateral negotiations, the process of these negotiations will shift and change. In such relations, the four key actors have their respective roles in negotiations. With respect to unification, these negotiators can be divided into four categories: ²⁴

- *Driver*: Chinese Mainland is like a driver who tries to take the initiative and control the whole situation. It is more active than other negotiators because this issue is more important to its interests and it believes that it has no time to lose in the process of national unification due to the increasing influence of the DPP. Under this situation, more concessions can be made for achieving an agreement of unification. But other sides show disinterest in this issue, and formal negotiations are often interrupted.
- *Defender*: The KMT is akin to a defender agreeing to the proposal on unification and owning a different viewpoint on the unified form. With respect to the goal of unification, the KMT has recently expressed an active and cooperative attitude due to frequent communications with Chinese Mainland and the changes in the political situation in Taiwan. Currently, it has become a critical actor in this matter with its positive position and some agreements favorable to Taiwan's economy, which were achieved with Chinese Mainland.

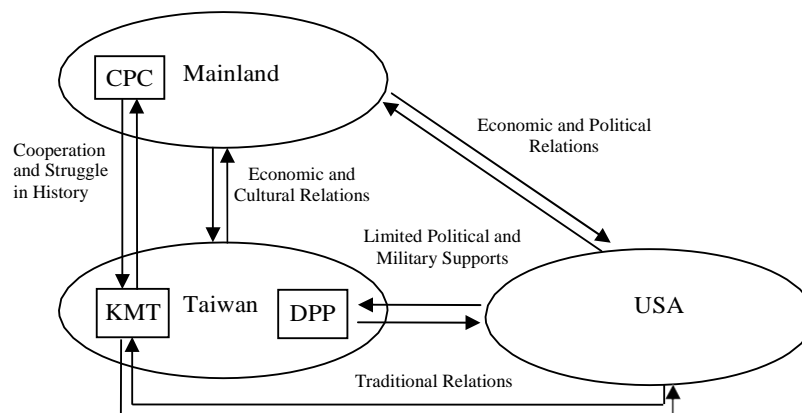
²³ *Relations between the USA and China*, White paper, by State Department of the USA, 1949

²⁴ Saner, Raymond, *The Expert Negotiator*, Martin Nijhoff Publishers 2005, Ch 11, p. 213.

- *Breaker*: The DPP has a totally opposite viewpoint on this issue. Its political goal is achieving a separate independent state rather than unification with the Mainland. Accordingly, it is more like a breaker who does not expect any agreement can be achieved and will sometimes set up barriers in the negotiations. Certainly, its power is not enough to match to Chinese Mainland's, so it must rely on support from the outside.
- *Cruiser*: The US has no direct interest in this issue. But it has countless past and present links in the matter and a series of indirect interests which will lead it to intervene. Because the US commands the strongest military force in the world and has a strong tendency to intervene in the affairs of other countries, its possible impact on this issue cannot be ignored. Currently, its behind-the-scenes support to Taiwan's DPP led its government has become an umbrella over the DPP's moves toward independence. But the US's position is not always constant over time. Rather, this is totally determined by changes in its critical interests in the region. Its behavior will strongly influence on the negotiation process.

Figure 1

The relationships among main actors



OPTIONS: POSSIBLE SCENARIOS AND PROBLEMS

There are several possible future scenarios that can be developed under the current political situation.

Unification

In general, the barriers impeding national unification are often economic and political. With the rapid economic development and the more open political atmosphere in Chinese

Mainland, unification will become accepted by most Chinese including most of the Taiwanese.

The exact form of unification could vary according to different viewpoints. There are some possible forms as follows:

- *Centralism.* This form is proposed by the Mainland, which believes that one unified country should also have a unified sovereignty rather than other forms of regime. The KMT agrees to this. The PRC also thinks "One China" should be the PRC instead of the ROC. This is not yet accepted by the KMT. But both sides have achieved a common understanding that they should firstly enhance communications and not consider this difference in the short term. According to the PRC's plan Taiwan, as a special political district, would have a high autonomy, capitalism, an army and even certain diplomatic rights.
- *Federation.* Here, Chinese Mainland and Taiwan would become two entities with a political status permitting separate regimes, and Taiwan would be completely autonomous. This form may be accepted by the KMT but it seems to be hardly acceptable to the Mainland now, as it is totally different from Mainland's current system and this type of equity with distinct powers would not be suitable. It is not absolutely impossible, however, and perhaps time is needed to draw a final conclusion in this scenario.
- *Confederation.* This is a very loose national structure, in which each has its own independent regime, and they can determine anything by themselves. There is no concept of "One China" in this scenario, and the possibility of re-independence of Taiwan will be much higher than now. This plan may be acceptable to the DPP, but seems not to be accepted by Chinese Mainland or the KMT.

Maintaining the Status Quo

In this scenario, the regime issue will be suspended, and communications and cooperation between both sides will continue as they do now, until the conditions of negotiation mature. According to some surveys in Taiwan and the Mainland's current situation, this scenario could be acceptable to the majority of Chinese on both sides of the Strait. Most people on Chinese Mainland think anything can be discussed as long as Taiwan does not announce independence. A survey, which was taken by Taiwan's government in December 2006, shows that the portion of the population supporting a status quo is up to 85.5%. Therefore, it is possible to maintain the status quo. Certainly, this situation is more favorable to unification because the economic, political and cultural relationships between Chinese Mainland and Taiwan will get much closer increasingly, and become a strong positive driving force for unification. But it is obvious that the DPP does not like support such a situation.

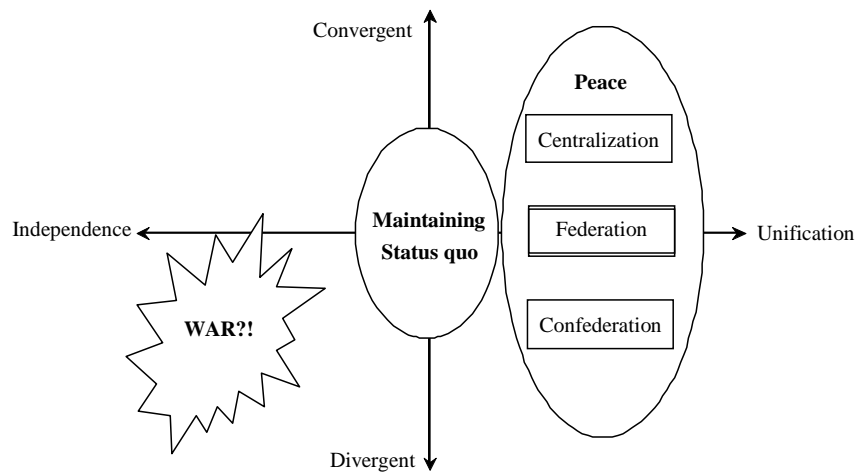
An Independent Taiwan

In this scenario, Taiwan gains sovereign nation status, rather than being part of the PRC or the ROC. Thus Taiwan becomes a new country with "freedom, democracy, happiness, justice and self-realization" as the DPP has stated. This is an extreme scenario that could lead to regional war. The current DPP government is working toward this goal of

independence. Actions recently taken by the DPP have sharpened the tension across the Taiwan Strait. If regional war breaks out due to a declaration of independence by Taiwan, it will be a disaster for both Taiwan and Chinese Mainland. Although most Chinese in the Mainland do not expect this to happen, they will engage in a war for unification regardless of their loss and interferences from other countries. The consequence of war will be unimaginable.

Figure 2

Possible scenarios in the future



STRATEGIES IN THE NEGOTIATION

The different positions of these four actors – Chinese Mainland, the KMT, the DPP, and the US – determine their strategies. According to the current political and economic situation and its developing tendency in the near future, the possible strategic choices are shown as follows:

- *Chinese Mainland* – Chinese Mainland adopts an active policy and a clearly assertive stance. So, we can say that it is in a collaborative mode according to the classic categories. This mode is positive to the beginning of negotiations. But, this attitude will probably change toward competitive as time passes, national power increases, economic and cultural ties with Taiwan grow closer, and military force improves. The development of the macro-environment is favorable to Chinese Mainland. In addition, the economic relationship with the US will create a better environment for negotiations concerning Taiwan. It is also possible for Chinese Mainland to change its attitude to a compromise mode because the rising

sentiment in favor of Taiwan's independence might force it to resolve the conflict in a short period of time.

- *The KMT* – The KMT's current strategy leans towards a compromise mode due to its special political status and history, making negotiations on this matter possible. If the KMT adopts a unanimous explanation about "One Country", the process and length of negotiations would be greatly shortened. It would also be used as a means to continuously develop communications and economic cooperation between Taiwan and the Mainland.
- *The DPP* – The DPP's current strategy is a competitive mode with a strong assertion towards independence. If this does not change, negotiation seems to be impossible. The achievement of DPP goals, however, requires support from the US; otherwise it would be realized with a very little possibility. To ensure independence, the DPP could choose to enhance Taiwan's military force with US aid and military support, thereby increasing tension. The possibility of the DPP changing its policy appears unlikely unless the US puts pressure on it.
- *The US* – Currently, the US position is more oriented towards competitiveness in the negotiation. Its supports of Taiwan encourage the DPP to continue its policies toward independence. The US's next strategies are uncertain, and other modes may be possible – otherwise a war in the Taiwan Straits would be almost unavoidable. The compromise mode seems to be a good choice.

CONCLUSION

According to the above analysis, the possibility of solving the tension over Taiwan is very small in the short term, and the process of negotiations could last a very long time. The positions of each actor do not allow for a resolution of the conflict. Therefore, flexible strategies need to be adopted in future negotiations. Given that many issues are still being negotiated, maintaining the current situation maybe a good choice in the near future. More time might be needed for parties to communicate with each other and negotiate solutions to each issue. It is not advisable, however, to take an attitude of non-cooperation. Such a strategy merely postpones the resolution of this matter without limit. Unilateral changes to the current situation are risky because such changes would make this conflict too complicated to be solved by peaceful means.

Therefore, maintaining the status quo would be a good choice at present. The changing economic, political and cultural environment in Chinese Mainland and Taiwan will produce more new opportunities to achieve agreement on the Taiwan issue. However, some necessary communications and negotiations are needed for this idea. An isolated and non-cooperating policy cannot solve any issue. In a changed environment, a solution accepted by each side may be easily worked out.

In summary, the PRC does not want to lose Taiwan as part of its territory and it also does not want to destroy Taiwan due to military actions, which it has to take. Simultaneously, the Taiwanese do not want to lose their freedom and wealth, and also hope that Taiwan and the Mainland do not become opponents. Ultimately, there is no inherent contradiction between the two basic demands according to the stated goals and above

outlined possible solutions. Active steps to resolve the matter of Taiwan would be welcomed by most people on the Mainland and on Taiwan.

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CYPRUS CONFLICT: WILL IT EVER END IN AGREEMENT?

Raymond Saner

ABSTRACT

The goal of this chapter is to describe factors, which have contributed to the persistent failures of peace negotiations on Cyprus. In particular, the author attempts to delineate the impact which multiple and competing external stakeholders (influential foreign powers, supranational institutions, intergovernmental organizations and NGOs from various countries) have had on the peace process and how these third parties (first level GR and TR, secondary level USA, UK, EU and UNO) have used the Cyprus conflict for their own strategic aims and secondary gains by offering their influence to the two conflict parties (Greek Cypriots and Turkish Cypriots). As a result of these ongoing external stakeholders interferences, the Cyprus conflict has persisted and negotiation behavior of the primary conflict parties became characterized by opportunistic tactical maneuvers prolonging and deepening non-agreement ever since the peace enforcing presence of UN forces on the island starting in 1974 and lasting up to the writing of this article.

BRIEF SUMMARY OF CYPRUS CONFLICT 2002-JANUARY 2006 ^{1,2}

In January 2002, direct talks under the auspices of Secretary-General Annan began between Republic of Cyprus President Glafcos Clerides (Greek community) and Turkish Cypriot leader Rauf Denktash (Turkish Community). In November 2002, UN Secretary-General Annan released a comprehensive plan for the resolution of the Cyprus issue. It was revised in early December. In the lead up to the European Union's December 2002 Copenhagen Summit, intensive efforts were made to gain both sides' signatures to the document prior to a decision on the island's EU membership. Neither side agreed to sign. The EU invited the Republic of Cyprus to join on 16th December 2002.

Following the Copenhagen Summit, the UN continued dialogue with the two sides with the goal of reaching a settlement prior to Cyprus's signature of the EU accession treaty on 16th April 2003. A third version of the Annan plan was put to the parties in February 2003. That same month the Secretary-General again visited the island and asked that both leaders agree to put the plan to referendum in their respective communities. Also in February 2003, Tassos Papadopoulos was elected as the fifth president of the Republic of Cyprus. On 10th March 2003, this most recent phase of talks collapsed in The Hague, Netherlands, when Denktash told the Secretary-General he would not put the Annan Plan to referendum.

In February 2004, Papadopoulos and Denktash accepted the Secretary-General's invitation to resume negotiations on a settlement on the basis of the Annan plan. After

¹ Even though openly in favor of many positions put forward by Northern Cyprus, Dodd (1999) offers a very good summary of previous attempts at conflict resolution on Cyprus.

² Within the period of 1964-1994, the United Nations passed 17 statements and letters by the UN Secretary General, 93 Security Council Resolutions, 13 UN General Assembly resolutions, 6 UN reports by the Commission on Human Rights (Source: "Resolutions Adopted by the UN on Cyprus Problem," published by the Press and Information Office of the Republic of Cyprus, Nicosia)

meeting with Annan in New York, talks began on-island on 19th February 2004. The two community leaders, Rauf Denktash and Tassos Papadopoulos, met nearly every day for negotiations facilitated by the Secretary-General's Special Representative for Cyprus, Alvaro de Soto. In addition, numerous technical committees and subcommittees met in parallel in an effort to resolve outstanding issues. When this stage of the talks failed to reach an agreed settlement Rauf Denktash refused to attend the next stage of meetings which were scheduled to take place in Bürgenstock on 24th March 2004 and sent Mehmet Ali Talat and Serder Denktash as his agents. The talks collapsed and the two communities reached no negotiated agreement. The Secretary-General then stepped in as arbitrator and on 31st March presented to the two sides a proposed final settlement. Rauf Denktash rejected Annan's proposal immediately and Tassos Papadopoulos rejected the plan a week later while Mehmet Ali Talat supported it.

The plan was placed before the two communities in a simultaneous vote in the reunification referendum of 24th April 2004. Whilst the proposal received a 65% favourable vote from the Turkish community, the Greek Cypriot community rejected it by three to one. Since implementation of the plan was dependent on its approval by both communities, reunification did not take place. Had there been a positive vote on both sides, a unified Cyprus would have acceded to the European Union on 1st May 2004 instead Cyprus joined the EU without the northern part populated by the Turkish Cypriots.

Since then, low key talks have started again between the newly appointed UN Under Secretary General for Political Affairs, Mr. Kieran Prendergast and leaders of both communities and on 16th June 2005, the UN Security Council unanimously adopted resolution 1604, thus renewing the mandate of the UN Peacekeeping Force in Cyprus (UNFICYP) for a further six months, until 15 December 2005 and EU Enlargement Commissioner Olli Rehn appointed Jaakko Blomberg, former Finish envoy to Cyprus, as EU Commission special adviser on Cyprus in June 2005.³

On 3 October 2005, membership negotiations were symbolically opened with Turkey, which has been an associate member of the EU since 1963 and an official candidate since 1999. The historic decision on 17 December 2004 by the European Council was confirmed by the European heads of state and government on 17 June. On 29 June 2005, the Commission presented its negotiating framework to Ankara, and after a full day of intense negotiations the EU-25's foreign ministers finalised the document on 3 October 2005. Within hours, Turkey accepted the terms.

Amid a flurry of controversy over Turkey's action plan' on Cyprus, the UN has announced its intention to start a new round of Cyprus peace talks in May 2006. This came about after the Turkish Prime Minister Recep Tayyip Erdogan has called for a meeting on the Cyprus conflict to be held "in May or June 2006" with the participation of representatives from Turkey, Greece and the Turkish and Greek Cypriot communities.

Meanwhile, Kofi Annan's spokesman George Lillikas has said that the UN will resume its peace efforts in Cyprus after the May 2006 parliamentary elections in the Republic of Cyprus. "Our effort is to avoid a hasty new process of negotiations, which would fail in no time," said Lillikas.

³ From the perspective of many Southern Cyprus officials, the UN was keeping peace but not making peace. The presence of UNFICYP prevented an outbreak of new violence but indirectly sanctioned the occupation of parts of Cyprus by Turkish armed forces. From the perspective of many Northern Cyprus officials, the UN failed to protect the Turkish minorities in 1960-1974 and through its refusal to extend political recognition to Northern Cyprus, the UN failed to act as a neutral third party.

In its action plan revealed on 24 January 2006, Ankara has said that it would open its ports and airports to Greek Cypriot carriers on condition that they reciprocally end restrictions on Turkish Cypriots. The initiative was welcomed by the EU, the US and the UN, but it was immediately rejected by Greek President Tassos Papadopoulos and the Greek Cypriot leaders as a rehashing of earlier inconclusive proposals.

In the same breath, the Greek leaders also criticized British Foreign Secretary Jack Straw for his whistle-stop meeting with Turkish Cypriot leader Mehmet Ali Talat. Reacting to Enlargement Commissioner Olli Rehn's statement that "the Commission welcomes efforts to achieve progress" in the current Cyprus deadlock, Nicosia has lodged an official complaint with the Commission, questioning whether Rehn was in a position to express the Commission's support for the latest Turkish 'action plan' before the Commission had actually considered the initiative.⁴

UN Undersecretary General Ibrahim Gambari visited Cyprus on 6-9 July 2006, held talks with Mr. Papadopoulos and Mr. Talat. Secretary General's Special Representative in Cyprus, Michael Moller, is supposed to continue with discussions between both parties and the Security Council renewed the mandate of UNFICP for another six months beyond 15th December 2006 (SC Resolution 1728). Hence, all looks set for another round of informal talks, quasi negotiations, initiatives etc. with uncertain outcome for all parties concerned but with a nagging wink along the proverbial French proverb which says: *plus ça change, plus ça reste la même chose*. The future will tell what will be possible.

PROBLEMATIC CAUSE-EFFECT TIME LINE OF CYPRUS CONFLICT

While most scholars agree that the Cyprus conflict is one of the longest lasting continuous international conflicts, few can agree as to when the conflict started hence there is no agreement on the timeline. For many experts and scholars, the international Cyprus conflict started with the attempted coup in 1974 by Greek Cypriot Sampson against then president Makarios. Sampson's violent coup was supported by the then military junta in power in Greece with the aim of achieving ENOSIS (unification of Cyprus with Greece). This attempted overthrow of the Cypriot government led subsequently to the military interference by Turkey, one of the guarantor states of newly independent Cyprus, ostensibly to protect the Turkish Cypriot minority from possible violent acts by the majority Greek communities without though retreating to Turkey ever since.⁵

⁴ The Institute of Multi-Tack Diplomacy (IMTD), Washington DC, and the Conflict Management Group (CMG), Cambridge Mass, joint forces under the name "Cyprus Consortium" to implement a training program in Cyprus focusing on conflict resolution, to build trust relationships and to demonstrate to their communities the potential for cooperation between the two sides of the conflict. (Notter, J, McDonald, J, 1998)

⁵ Distinction needs to be made according to de iure and de facto use of terminology. According to UN practice, the Republic of Cyprus is the legitimate government representing the whole of the island while the TRNC has been declared legally invalid by the United Nations (Resolutions Nr. 541 (1983) and Nr. 550 (1984). The authors acknowledge the existing legal distinctions but for the sake of clarity and editorial expediency, de iure and de facto titles and denominations will be abstracted to Southern Cyprus (controlled by Republic of Cyprus) and Northern Cyprus (controlled by Turkish Republic of Northern Cyprus), and titles of heads of governments simplified to leader of Greek Cypriots (Mr. Clerides) and leader of Turkish Cypriots (Mr. Denktash).

What remains puzzling is the inactivity of the UK, the third guarantor nation of Cyprus. Greece being temporarily paralyzed by the collapse of the military junta and the return to democracy was in no position to intervene militarily on the island. This was not true in regard to the UK who had troops stationed on its two extraterritorial military bases. The military inactivity led to speculations as to the intention of the UK government and by extension of the USA which were recently rekindled by the release of the Callaghan report that seems to suggest that Former Secretary of State Henry Kissinger was intent not to intervene nor suggest intervention by the UK forces in order not to oppose Turkey's goodwill in relation to US policy in the area.⁶

The ensuing war and partition of the island led to the intervention of the UN who dispatched peace enforcing military forces (UNFICYP) stationed between the two sides along the so called green line dividing the island into Greek Cypriot controlled South and a Turkish Cypriot controlled North with both sides' military forces being supported by Turkish and Greek army units. The largest foreign force though being the Turkish army units stationed on the Northern part of the island since 1974 and ever since. Pointing out the discrepancy between the UN Force's success in keeping peace but on the other hand not being able to fulfill its mandate of "bringing a return to normal conditions", Evriviades & Bourantonis (1994) suggest that the UN peacemaking efforts were fundamentally flawed since it led to a freezing of a status quo on the island.

Some scholars attribute the cause of the 1974 violence and inability of both sides to peacefully reunite the two sides to earlier disputes and related violence. Diana Weston Markides (2001) for instance goes back to colonial rule by the UK and suggests that the inability of both communities and of the British administration to create functioning municipal administrations acceptable to both communities was a key factor of subsequent division of municipalities along ethnic lines leading further to a full break down of cooperation between both communities at central government level in 1963, only three years after Cyprus reached independence in 1960 from UK. Until 1957, the main towns of Cyprus were run by councils elected on the basis of communally based proportional representation inevitably resulting in Greek-dominated bodies run by Greek Cypriot majors. With independence from Britain looming and facing a power imbalance at municipal level, some leading members of the Turkish Cypriot community requested that at the time of British withdrawal, Cyprus should be retro ceded to Turkey from Britain who took control of the island in 1878. The orders given to their respective Turkish Cypriot communities were to withdraw from any official participation in municipal administrations.

Other scholars suggest that causes to the conflict go much further back on the time line alluding for instance to the cruelties committed during the invasion and subsequent rule of the Ottoman empire, the various wars, sacking, pillaging through the period of the Christian crusades and the competition between the Venetian and Genovese colonial intrusions into the region.⁷ As Alvaro de Soto, previously UN Secretary General's Special Advisor on Cyprus stated (2005):

⁶ Turkey and Greece have been reported to have received in 1992-93 alone 2,822 tanks, 1,084 armored combat vehicles, 303 large caliber artillery systems, 28 attack helicopters and 14 warships (source: Financial Times, 7 June 1994); in addition it was reported that the Clinton administration notified Congress of plans to deliver 14 frigates to Turkey and 11 frigates to Greece over the next two years in a package of sales and give-aways worth approximately \$250 million (Source: International Herald Tribune, 3 July 1998)

⁷ A stalemate based on the insights of the game theory strategem of the prisoner's dilemma (Axelrod, 1985) which states that cooperation might be more realistically possible once both parties to a conflict

Regrettably, as Churchill said of the Balkans, Cyprus has more history than it can digest. Trying to capture what happened in a few paragraphs is the diplomatic equivalent of walking through a minefield. For the Turkish Cypriots, the problem began in 1963 when Greek Cypriots hijacked and tried to Hellenise Cyprus, undoing the partnership enshrined in the 1960 constitution, corralling them in a small number of villages out of fear for their lives. The Greek Cypriots tend to fast-forward to 1974 and say that the problem started with the Turkish invasion and continues with its occupation. As Oscar Wilde said, the truth is never pure and rarely simple.

Mr. De Soto speaks from experience as he has been at the centre of the most recent failure to reach an agreement culminating in April 2004 when the so-called Annan⁸ plan was accepted by 65% of the Turkish Cypriots but rejected by 75% of the Greek Cypriots.

Looking at the region from a historical point of view and reflecting on the wrangling for power over the territories of the former Ottoman empire by the UK, France, Russia and Greece and Turkey, it is very instructive to follow in more depth the conflicting strategic interests of the big powers around the time of the Lausanne conference 1922-23 (Goldstein, 2003). Taking this conference as an early indicator of what was to come later in regard to the Cyprus conflict, Goldstein's article gives a very good picture of how third parties can decisively influence the outcome of international negotiations.

Another frequently mentioned perspective is the one concerning the role of the EU. For instance Oliver Richmond (2005) suggests that the EU expected "to act as a catalyst for the settlement of the Cyprus problem without becoming a direct mediator" (p.100) but by allowing Cyprus to become member of the EU before reaching an agreement with the Turkish Cypriots, "the EU effectively became a party to the conflict" (p 109).

Related to the above, fault has been attributed to the UN secretary general and his team of negotiators who lost their neutrality by making use of the UN mandate to act as arbitrator when faced with no agreement after the failed B rgerstock negotiations in 2004. By imposing a "UN solution", authors close to the Greek Cypriot position declared the UN mission of good office as a debacle (Palley, 2005). While such observation is worthy a longer discussion, attacking experts of the UN team as being of dubious intention reveals the suspiciousness and animosity, which have always characterized the Cyprus negotiations.⁹

Finally, observations have been made about the fact that both sides to the conflict enjoy higher GDP per capita than their respective mother lands (Saner & Yiu, 2002). This could be due to the ingenuity and hard work of the two communities. It could also be due to the fact that both sides receive support from Greece and Turkey respectively and from third parties such as the UN (e.g. UNDP) and bilateral donors. Long lasting conflicts tend to

realize that a win/lose strategy would start a mutually destructive lose/lose war. This strategem however is based on the assumption that players are conducting decision-making processes based on logical and reasonable cost-benefit analysis, an assumption, which requires the control of emotional behavior, which most observers of the region do not take for granted.

⁸ Hardy and Phillips (1998: 218) observed that dominant stakeholders may want to ensure that the domain definition does not change. Domain being defined as processes of social construction and meaning creation wherein social order is being negotiated by key stakeholders.

⁹ See Boatswain and Nicolson (1989) which describes the historical misgivings held by many Greeks based on the period of Greece's rule by the Ottoman empire.

attract parallel economies (Wennmann, 2005) and result in duplication of governmental structures, which in turn require additional resources of sometimes dubious origin.

ATTEMPT TO DEFINE THE COMPLEXITY OF THE CYPRUS CONFLICT

When mentioning the Cyprus conflict, most often allusion is made to the inter-communal conflict between Greek and Turkish Cypriots going back to pre-independence times as described in previous section. However, due to the fact that three guarantor countries (UK, Turkey, Greece) have the constitutional right to intervene unilaterally if seen needed, the intercommunal conflict was immediately lifted up to the level of conventional war (e.g. Turkey's landing of troops on the island in 1974 leading to war with the forces of the official Cypriot government¹⁰). In addition, subsequent to the conventional war between official Cyprus and Turkey, the Security Council of the UN following multiple resolutions passed by the US Assembly gave a specific mandate to the UN Secretary General and his office to create a peace enforcing group of UN soldiers to interpose themselves between both belligerent parties (green line) and to initiate diplomatic efforts which should lead to reconciliation and reunification. From a conflict theory point of view, one could hence classify the Cyprus conflict as consisting of a bilateral conflict (Cyprus-Turkey) mediated by a third party namely the UN Secretary General and influenced by multiple stakeholders (e.g. two remaining guarantor countries Greece and UK, the EU as political supranational umbrella representing Greece, UK, since May 2004 Cyprus (Southern Cyprus) and all the other EU member countries.¹¹

ALLIANCES, NETWORKS, PAYOFFS RELATED TO THE CYPRUS CONFLICT.

Figure 1 below gives an overview of the multiple coalitions that have direct or indirect impact on the outcome of any negotiated solution of the Cyprus conflict, if ever achievable at all. Third parties to the conflict can either try to be constructive and help bring about a resolution of the conflict or they might be interested in using the conflict to obtain concessions elsewhere.

Several interest alliances are known to be influential in the region and linked to the Cyprus conflict. On one hand there is configuration of countries tied to each other through various pacts and cooperation agreements ranging from cooperation in the military sector (Turkey, Israel, USA) for example, to alliance against a common enemy or competitor such as Turkey and Israel together against Syria, Lebanon and Iraq (former Saddam Hussein regime).

On the other hand, a very old alliance exists between fellow Christian orthodox countries such as Greece, with Serbia and Russia (formerly Soviet Union) against Macedonia, Kosovo, Albania, and Turkey and a strategic alliance going back to the cold war with Syria against Turkey and later on Israel (as an ally of Turkey).

Another link based on common interest and years of active cooperation exists between the UK and the USA. The two bases ceded in perpetuity to UK are used for high tech espionage work covering the near East, the Black Sea and the Caucasus area. The airbase has been used during the Iraq war and is intended to be at service for any other armed conflict situation. A fully reunited and harmonious Cyprus could question the legitimacy of the two bases and even ask the UK to retrocede them to the sovereign country of Cyprus.

¹⁰ Turkish Daily News, Jan. 31, 2002, "General Ozkok defines solution in Cyprus".

¹¹ Fareed Zakaria, "The Fears of America's Steadfast Muslim Ally." Newsweek, 28 January 2002. p.5

The UN secretariat has its own concern and tactical alliances. The Cyprus conflict has meant continuous expenditure, troop presence and fulfilling the mandate to be a conciliator of this old conflict. Having had to face increasing criticism especially from the US and the UK, it is perfectly understandable that the UN SG would like to see an end to the Cyprus conflict. Not to find a solution means continued expenditures that are actually needed elsewhere. Also, not being able to find a solution represents the risk of negative PR with third parties.

The alliance network depicted in Figure 1 is not exhaustive. It solely serves to illustrate the complexity of the Cyprus conflict and the obvious links to other business that countries might have with each other or with other groups and where a solution or the withholding of a solution on the island could be to these third parties best interests but to the detriment of the concerned two communities. A classic case of such opportunistic use of conflicts is for instance the use of veto power by Greece to block internal EU and NATO decision making processes. To opt for a negotiators behaviour called “nuisance factor”, third parties can score points for their protégé (here Greek Cyprus) as well as use their blocking power to bar entry of Turkey to the EU until Turkey e.g. makes concession in other domains.

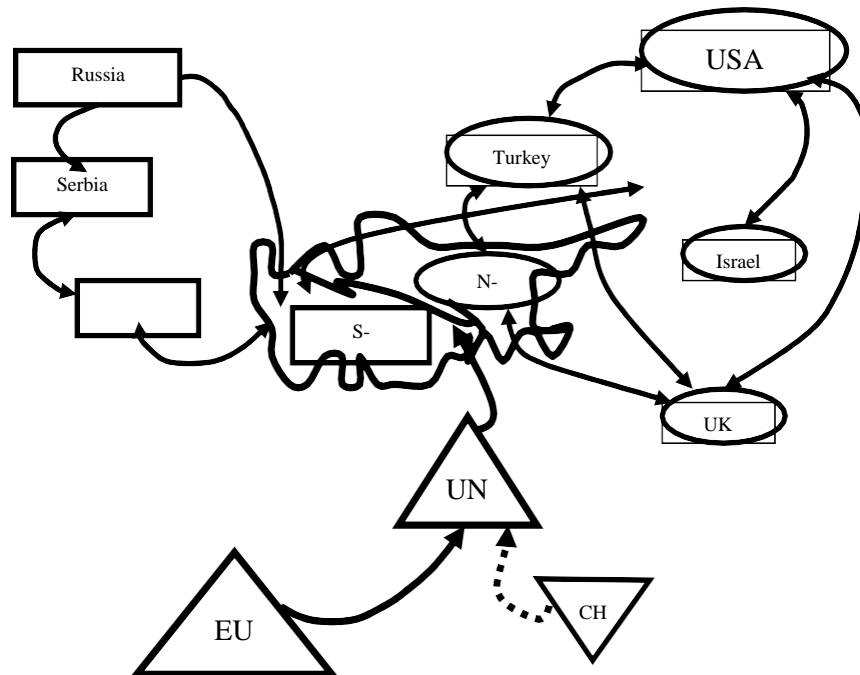
It is unrealistic to expect a solution to the Cyprus conflict without a simultaneous package deal covering all the additional external conflicts described above. In other words, a solution to the Cyprus conflict necessitates a comprehensive solution covering the Cyprus conflict but also the other stakeholder interests and conflicts now so clearly linked to the Cyprus conflict ¹².

CONFLICT COMPLEXITY IN ACTION: INFLUENCE OF THIRD PARTIES ON MALIGNANT CYPRUS CONFLICT

Cyprus has also been cynically called “the graveyard of well intentioned mediators”. Over the last 32 years, a multitude of peace initiatives have resulted in failure. The list of failed attempts of official and non-official third-party interventions is long (see Diamond & Fisher, 1995; and Dodd, 1998). What follows is the list of the main causes that lead to a failed Track III attempt to bring the two communities together through a so-called confidence-building project. The case itself is described in detail elsewhere (Saner & Yiu, 2002).

The basic idea of the Track III project was to create joint projects in the economic sphere that would offer mutually beneficial incentives to both sides. The proposal was based on the assumption that a Swiss NGO could provide a neutral arena in contrast to the UN auspices of the Secretary General of the United Nations who was at different times seen as being biased by either one of the two parties or sometimes by both for different reasons, or to a UK- or US-based NGO because of their affiliation or perceived allegiance to their respective governments who were in fact actively intervening as behind-the scene external stakeholders.

¹² Yesilada & Sozen (2002) for instance offer a very well argued analysis of the Cyprus conflict based on game theory and the prisoner dilemma concept. While such game theoretical perspective offers interesting insights, it is also insufficient since it reduced real complexity of multi-stakeholder interferences to a purely bilateral conflict between Greek and Turkish Cypriots

Constellation of Cyprus Negotiations

The author and his colleagues hence concluded that only a new approach which had not been tried before could succeed—the involvement of both sides' economic interests in order to develop sufficient common ground for future inter-communal cooperation. What seemed possible was a non-official third-party intervention, which would not jeopardize the ongoing political efforts of the UN. The key to success would be to side-step the political big picture discussions and to focus instead on common economic interests of both communities. If the economic cooperation project succeeded, both sides would gain sufficient confidence to tackle the more complex political issues at a later stage.

In regard to practical steps, the author drafted a project concept and presented it in person to key government officials such as to UN SG's special envoy for Cyprus in New York, the US State Department, southern European Affairs Office, in Washington, The Royal Institute of International Affairs in London (Cyprus desk), the EU Commission Division DG 1 in charge of EU-Cyprus relations, UNDP resident representative in Cyprus,

the Chambers of Commerce of both sides of the conflict divide, representatives at Greek and Turkish Missions to the UN in Geneva and others more. Switzerland was willing to extend financing for the project under conditions that the UN would welcome the project, support it and that a second country would join the initiative.

FACTORS CONTRIBUTING TO THE FAILURE

The project did not become operational for various reasons. It could be said that the time was not ripe for such an inter-communal project since each party involved was still trying to “win,” which by definition was unacceptable to the other party.

From a position of Realpolitik, one could indeed say, “Don’t force cooperation if there is no will to cooperate,”—in other words, the international community should allow the opponents to be separated from each other and to accept the inevitable dividing up of Cyprus into two distinct and independent states. While this seems to be the solution preferred by many Cyprus experts, at the time of the project proposal it did not seem that all efforts were tried yet and that the will towards reconciliation was not yet exhausted. On the contrary, it seemed that the majority of the citizens of both communities favored reconciliation, not separation.

But the main cause for the failure of this Track III project was the multitude of interferences by third parties who influenced the members of both communities according to their own strategic designs leading to paralysis. The paralysis came about because of destructive impact of competition between external and internal parties and institutions who are all stakeholders to the conflict, but who at the same time cannot cooperate among themselves. Their competition often lead to confusion and dangerous instability since they at times tried to manipulate the two side’s officials and populations, while at the same time they also became the victims of manipulations by either sides’ officials and opinion leaders.

The main forms of third party interferences as described in Saner & Yiu (2002) were:

- A) Interferences due to contradictory strategies of key external stakeholders
- B) Interference due to local stakeholder prerogatives
- C) Interference due to historical distrust of main conflicting parties
- D) Interferences due to the use of the “Cyprus card” for secondary gains elsewhere
- E) Interference due to competing agenda of institutional stakeholders: the United Nations Secretariat, the United States of America, the European Union, the United Kingdom
- F) Interferences due to bilateral tensions between Greece and Turkey
- G) Interferences due to competition between local leaders
- H) Interferences due secondary gain of current impasse

PRESSURE TACTICS BY THIRD PARTIES TO THE CYPRUS CONFLICT: RECENT EXAMPLES

What follows are two examples of third parties interferences, which occurred over the last three years. The first example is the pressure tactic, which was used by the UN in close cooperation with the EU, the USA and the UK during the build up to the EU membership date of Cyprus. The second example gives an example of Turkish pressure tactics during

the delicate phase of last minute negotiation at the Bürgenstock, which ultimately sealed the resistance of the Greek Cypriot leadership against the Annan plan.

Annan V

The Annan plan for Cyprus in fact evolved over time starting with Annan I (11th October, 2002), moving to Annan II (10th December 2002) on to Annan III (8th March, 2003). Annan IV was a short lived trial version before the final Annan V (31st March, 2004)¹³ which was presented to the public a few days before the referendum took place in both communities consisting of several thousands of pages. Based on the limited access to documented texts, it appears that the UN team in unison with the EU, USA and UK delegations hoped to accommodate Denktash's objections by progressively adding concessions to the benefit of the Denktash position and to the detriment of the Greek Cypriot position. At the same time, the UN team in unison with the EU Commission and the USA, UK assumed that presenting the Greek Cypriot side with a last minute complex deal a few days before the referendum and four weeks before official acceptance as EU member would be too much to reject for the Southern Cypriot leadership and people.

The opposite was the case. The negotiation behavior of the UN and the three big power were seen as "take it or leave it" pressure on a subject matter that was too crucial for both communities future. Too much was at stake than to almost blindly trust that the complicated text would be in the interest of the Greek community. Holding a quasi monopoly in the official media, President Papadopoulos was easily able to highlight the negative aspects of the deal while downplaying the potential benefits. When under pressure and facing uncertainty, most people reject experiments which they cannot control or whose implications they cannot anticipate. Adding to this uncertainty came anger when it became known that the Turkish settlers would be allowed to vote in contrast to a comparable vote in East Timor where Indonesian settlers were not allowed to vote during the crucial vote on independence of East Timor.¹⁴¹⁵

Ambassador Ziyal's "final points"

Another example of high pressure of time and demands was the famous by now famous list of 11 points presented by Ambassador Ziyal on 26th March at the beginning of the Bürgenstock meeting which was attended by the Presidents of Turkey, Greece, Cyprus (Greek Cypriot), the UN Secretary General, Colin Powell and other world leaders. However, Mr Denktash opted to stay at home and to be replaced by Mr. Talat, then holding

¹³ For detailed analysis of how the four Annan proposals evolved over time see Claire Palley (2005), "An international Relations Debacle: The UN SG's Mission of Good Offices in Cyprus 1999-2004", Hart Publ., Oxford, pp-275-314.

¹⁴ Evriviades, E., Ambassador of Cyprus to the USA (2005) "Cyprus in the EU: Once Year later-Prospects for Reunification", American Hellenic Institute, Washington, 23 May 2005, p.5

¹⁵ For many scholars following the Cyprus conflict, it was a surprise that the EU would allow membership of a country which did not have full control of its territory. It was however often insinuated that without Cyprus being given EU membership status, Greece would not have agreed to NATO enlargement.

the function of Prime Minister of the TRNC and his son Serdar Denktash in the role of TRNC Minister of Foreign Affairs. The absence of Denktash, then still president of the TRNC, a leading figure of the Cyprus conflict, should have been sufficient reason to cancel the Bürgenstock meeting which went ahead anyway for reasons suggested in previous section.

Being absent from the meeting, Denktash did not have to submit to pressure nor extend any concessions. His son and Mr. Talat's mandate for negotiations and possible give-and-take concession making being seriously limited, there was not much hope for the Greek Cypriots to be able to trade concessions. To this one-sided situation comes the sudden presentation of 11 "final points" of Turkey presented by Ambassador Ziyal to the UN and addressed to the Greek Cypriot representatives – again, the pressure of a last minute surprise demand. Alike the Annan V "last minute proposal." The eleven points consisted of the following:¹⁶

1. The percentage of the Greek Cypriots returning to the North should be reduced from 21% to 18%. This percentage is the least we can accept.
2. The Turkish Cypriot proposal regarding the property issue (1/3) should be accepted.
3. Bi-Communal/bi-national configurations, such as 24 Turkish Cypriot and 24 Greek Cypriot Senators should be properly reflected in the Plan.
4. The restriction of 55 to be applied to the Turkish citizens to establish residence in Cyprus even after Turkey's accession to the EU should be lifted.
5. Inclusion in the Plan of the understanding of neither side claiming jurisdiction and authority over the other side.
6. The individual applications of the Greek Cypriots to the ECHR, including the ones on the loss of use should not be encouraged. The United Cyprus Republic should be the sole responsible addressee for these cases.
7. Our expectations regarding the security and guarantees should be fully met.
8. Preservation of Greek and Turkish military presence on the Island even after the accession of Turkey to the European Union. (The contingents provided by the treaty of Alliance should be maintained.
9. Measures should be developed for effective preservation of bi-zonality
10. Turkish Cypriot citizens originating from Anatolia should not be discriminated against within the framework of a comprehensive settlement.

DISCUSSIONS OF RECENT EXAMPLES OF INTERFERENCES

Both examples of interventions by external parties shed light on the complex situation of the Cyprus conflicts. Gaining a point, even if beneficial on first sight for the ally, here Northern Cyprus, means often times scoring a point at home or signalling a message to third, fourth, fifth level parties outside the immediate Cyprus conflict "zone."

Taking for example the tough stance of Turkey during the Bürgenstock negotiation, one can also imagine that scoring points there was equal to getting points at home in Turkey and getting messages across to friends and enemies as well. Some of the motivations behind Turkey's tough stance might be related to the following concerns.

Turkey has been working hard on making political and economic reforms required for EU membership. It passed the hurdle of being accepted as EU candidate only in 2004.

¹⁶ Claire Palley (2005), p. Z.9, and pp 128-129 describing how many of points were accommodated by the UN team as reported from a pro Greek Cypriot perspective.

With Cyprus (Southern Cyprus) having become an EU member in May 2004, Turkey faces a situation whereby its own future EU membership application could be vetoed by Southern Cyprus since EU membership decision are taken by consensus. Southern Cyprus as new EU member could hence block Turkey's EU ambitions indefinitely, an unacceptable possibility for Turkey's political and economic leadership.

At the same time, the US government's anti-terrorist campaign and remodelling of post-Saddam Iraq is resulting in increasing pressure on Turkey to cooperate. Such an eventuality worries Turkish leaders since the defeat of Saddam has rekindled hopes in the Kurdish held territories of an independent Kurdish state in the northern part of Iraq. Turkish political and military leaders fear such an eventuality: An independent Kurdish state might re-ignite Kurdish rebellion in Turkey and even more worrisome might lead to new calls for Kurdish separation from Turkey. On the other hand, Turkey does not want to be seen as obstructing the US campaign against "evil powers."

Tensions are further kept high due to the continued threat of Southern Cyprus to install the S-300 PMU-1 Missile System bought from Russia which, if installed on the island, would alter the current military balance and possibly threatening Turkish airspace including parts of Turkey inhabited by its Kurdish minority unhappy with its status and treatment is the majority Turkish government. Southern Cypriot authorities promised to withhold the installation of the missile system but not to relinquish its right to do so at a later stage.

All this is of course not helped by recent statements of the Turkish Chief of General Staff General Hilmi Ozkok who declared in his new-year statement that Turkey should be "defending our rights and interests on Cyprus, which constitutes the cornerstone of our security in the Eastern Mediterranean."¹⁷

CONCLUSIONS

The objective of this chapter was to shed light on the impact of external stakeholders' interferences on a protracted conflict, in this case the Cyprus conflict. The impact of persistent interference by external stakeholders is a topic, which has not received sufficient exposure in the conflict literature so far. The objective of this article was hence to illustrate such third party interference in the case of the long-lasting Cyprus conflict and to describe the diverse forms of interferences used by the third parties and how these multiple interferences have turned the Cyprus conflict into a malignant conflict seemingly intractable to solve as long as third party interests remain high and secondary gains too important to maintain for business elsewhere.

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¹⁷ General Ozok : Defending our interests in Cyprus constitutes the cornerstone of our security in Eastern Mediterranean, excerpts of speech given by General Ozkok, www.hri.org/cyprus/tcpr/2006/06-01-02.tcpr.html

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PART III: ECONOMIC & POLITICAL CONFLICTS

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THE INTEGRATED FRAMEWORK: INSTITUTIONAL CONFLICTS OVER MANDATE, ROLE & RESPONSIBILITIES

Alessandro Bacci

ABSTRACT

Six multilateral institutions, the IMF, ITC, UNCTAD, UNDP, World Bank and the WTO, created the Integrated Framework in 1997 in order to help Least Developed Countries (LDCs) to be better integrated into the multilateral trading system and as a means to reduce poverty. The initial idea was that these six UN institutions would work together- each in its field of competence – and provide advice and support to LDCs in cooperation with other Integrated Framework (IF) member organizations. The results of inter-agency cooperation after the first three years were poor. The six Agencies had difficulties coordinating and cooperating. During the following years, the interagency cooperation process was revised but the collaboration remains not optimal. The reasons are principally: overlapping of functions and roles and absence of clarity regarding the procedures to be applied. The current impasse in the Doha Round negotiations has not helped the IF process either and special efforts need to be undertaken to make the needed IF process sustainable and effective.

THE INTEGRATED FRAMEWORK'S EVOLUTION SINCE 1997

The Integrated Framework (IF) was created in October 1997 at the World Trade Organization's (WTO) High Level Meeting on Integrated Initiatives for Least Developed Countries' Trade Development. Least Developed Countries (LDCs), also defined as Fourth World countries, are countries that, based on United Nations parameters, exhibit the lowest socioeconomic development, and the lowest Human Development Index rating amongst all the countries in the world¹. LDCs are principally located in Africa (34 countries), and then in Asia (10), Oceania (5), and North America (2). The least developed country in 2006 was Niger.

¹ Normally a country is considered as LDC based on three different criteria:

1. "Low income" defined as the three-year average gross national income per capita less than US dollars 750
2. Human capital weakness (very low level of nutrition, health, education and schooling)
3. Very problematic economic vulnerability (no stable agricultural productions, no stable resources coming from exportations, a too small economic tissue, economic importance of particular sectors and part of the national population displaced after natural disasters or conflicts).

Map of the Least Developed Countries as defined by the United Nations

Source: www.wikipedia.org

In general, these countries have the ongoing problem of extreme poverty, widespread armed conflicts in their territories (often with different ethnic groups fighting each other), political corruption, and for the most part an authoritarian form of government.

Given the significant problems LDCs face vis-à-vis international trade, in 1997 six multilateral institutions, the IMF, ITC, UNCTAD, UNDP, World Bank and the WTO, created the Integrated Framework in order to improve LDC understanding and results in the multilateral trading system, considered as the most important tool that LDCs have for fighting poverty. The idea was that these six UN institutions would work together – everyone in their field of competence – to achieve the best results for the LDCs. The first three years were challenging for the six institutions and the results were minimal. There were problems related to incomprehension, overlapping of functions and roles, and absence of clarity in the procedures to be applied. (See Appendix I for a summary of actor roles.)

After three years of impasse with very modest results in 2000, the six agencies met to evaluate the situation. They adopted some recommendations and to try to improve the effectiveness of the IF, deciding that the two most important goals of the IF should be:

1. To “mainstream” (integrate) trade into the national development plans such as the Poverty Reduction Strategy Papers (PRSPs) of least-developed countries.
2. To assist in the coordinated delivery of trade-related technical assistance in response to needs identified by the LDC. The IF is built on the principles of country ownership and partnership.²

From a structural point of view, the WTO in its LDC Unit houses the Integrated Framework Secretariat while the UNDP, in charge of all the six institutions, manages the IF

² In: www.integratedframework.org.

Trust Fund. The IF Steering Committee (IFSC) provides policy direction, makes evaluations of the progress achieved and should ensure total transparency in the entire IF process. It is a tripartite arrangement with members from the agencies, donors and LDCs.

In November 2001, in Qatar, the WTO with the Doha Development Agenda clearly brought the issue of development into the discussions regarding multilateral trade negotiations. The Doha Round focused on employment, better incomes and living standards “particularly through improved market access opportunities, rule-making and enhanced trade-related technical assistance, the DDA offers unique opportunity to developing and least-developed countries.”³ In the paragraph 3 and 42 of the Doha Ministerial Declaration, the convened ministers considered the vulnerability of LDCs and agreed that through the efforts of the WTO, LDCs should be integrated into the global economy. After these events it was clear that:

The progress in fulfilling the IF mandate raises several considerations worthy of mention. First, in terms of IF coverage of issues, the Sub Committee on Least-Developed Countries produced the WTO Work Programme for the Least-Developed Countries (LDCs) shortly after Doha, in February 2002 (WTO, 2002e). The programme highlighted the core systemic issues of relevance for LDCs in the context of the WTO. These issues were market access, TRTA/CB, support to the agencies dealing with export and production diversification, mainstreaming trade into the LDCIII Programme Action, participation and accession to the multilateral trading system, and a follow-up to LDC-related decisions and declarations. The Work Programme was further enhanced and narrowed by the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration, issued in the same month (WTO, 2002f). Concretely, the strategy consists of 10 points that are summarized below:

- Technical Assistance is seen as a mechanism for “mainstreaming” trade into national development strategies, in particular within programmes such as the PRSPs.
- Joint application of the revised IF is foreseen by the six agencies, where supply side constraints and capacity deficits prevail, and where trade is “mainstreamed.” Here, the WTO has clarified that providing trade-related infrastructure falls outside its mandate and resources.
- Effective and sustained coordination is to be sought with bilateral donors under the DAC/OECD, in the context of the Integrated Framework Steering Committee (IFSC).⁴

In September 2005, given the increased interest expressed from LDCs to participate in an IF program, the Ministers of Finance and Development at the Development Committee meeting of the World Bank and the International Monetary Fund approved a proposal to enhance the IF. During this meeting the “Doha Development Agenda and Aid for Trade”⁵ was discussed. The Communiqué of the Development Committee proposed the creation of an enhanced IF, with expanded resources and scope.

³ In: <http://tcdbdb.wto.org/publish/Report%20DG%20on%20TRTA.pdf>

⁴ Saner, R., Paez, L., “Technical Assistance to Least-Developed Countries in the Context of the Doha Development Round: High Risk of Failure” in 40 *Journal of World Trade*, p., 472, 2006

⁵ In : [http://siteresources.worldbank.org/DEVCOMINT/Documentation/20651864/DC2005-0016\(E\)-Trade.pdf](http://siteresources.worldbank.org/DEVCOMINT/Documentation/20651864/DC2005-0016(E)-Trade.pdf).

After this meeting at the IF offices in Geneva at the WTO Secretariat, Trade and Development Division, the Task Force to develop the IF was established.

The following December at the WTO Hong Kong Ministerial Conference, the paramount importance of linking the IF to the WTO's work⁶ was reaffirmed. The idea was to have an enhanced IF with some additional elements:

- increased, predictable and additional funding on a multi-year basis;
- strengthening the IF in-country, including through mainstreaming trade into national development plans and poverty reduction strategies; more effective follow-up to diagnostic trade integration studies and implementation of action matrices; and achieving greater and more effective coordination amongst donors and IF stakeholders, including beneficiaries;
- improved IF decision-making and management structure to ensure an effective and timely delivery of the increased financial resources and programs.
- the task force will make its final recommendations by the end of April 2006. And the enhanced IF is to enter into force before the end of 2006.⁷

The Task Force included representatives from both LDCs and donors. It met 12 times between January and May 2006, including a specific session dedicated to hearing the points of view of the six agencies. Then, on July 2006 the IF Steering Committee discussed and adopted the report of the Task Force. In this report the Task Force explains how it evaluated different models aiming to improve the IF's governance. Among these models are:

- improving the current arrangements without changing current attributions;
- concentrating management and main responsibilities into one agency but keeping the Secretariat separate;
- concentrating all the functions in one of the existing agencies;
- establishing a completely new organization with its own legal status or even contracting the whole process out to a private sector provider⁸.

The following table explains the different positions of the six agencies vis-à-vis the four models proposed above:

⁶ In : http://www.integratedframework.org/files/Ministerial_Conference_6thSession_Dec05_eng.pdf,

⁷ In : http://www.integratedframework.org/enhanced_if.htm, accessed May 15, 2007

⁸ In: http://www.integratedframework.org/files/W15_Eng.pdf, accessed May 15, 2007

Agency	<i>Improving the current arrangements without changing current attributions</i>	<i>Concentrating management and main responsibilities into one agency but keeping the Secretariat separate</i>	<i>Concentrating all the functions in one of the existing agencies</i>	<i>Establishing a completely new organization with its own legal status or even contracting the whole process out to a private sector provider</i>
IMF	++	-	--	-
ITC	+	-	+	--
UNCTAD	+	-	+	--
UNDP	+	+	-	-
WB	++	-	--	-
WTO	-	-	++	--

Key: ++ strongly favorable, + favorable, 0 neutral, - unhappy, -- very unhappy

Using SWOT analysis the Task Force excluded the first and the fourth model because they were considered as not linked with the aims of the IF. Instead the Task Force realized that was crucial for the IF to have sufficient resources and a clear line of accountability. The IF Secretariat should have been improved in order to have a defined line of accountability permitting faster decision-making. The Task Force underlined that the IF was not capable of being effective because it was lacking both a valid and thin management structure and a clear division of responsibilities between the six different agencies (although it should be noted that three of these have a major role: WTO (Secretariat), World Bank (diagnosis of the situation) and the UNDP (Trust Fund). In any case, it should be understood that the Task Force did not want to create a new organization but principally wanted to enhance the role of LDCs. It was proposed to partially modify the:

governance structure by proposing to keep the IF Steering Committee as the overall governing body, to transform the IFWG into a Board with greater recipient and donor participation, and to turn the Secretariat into an Executive Secretariat with a Chief Executive Officer. The IF would continue to rely on the agencies in achieving its mandate.⁹

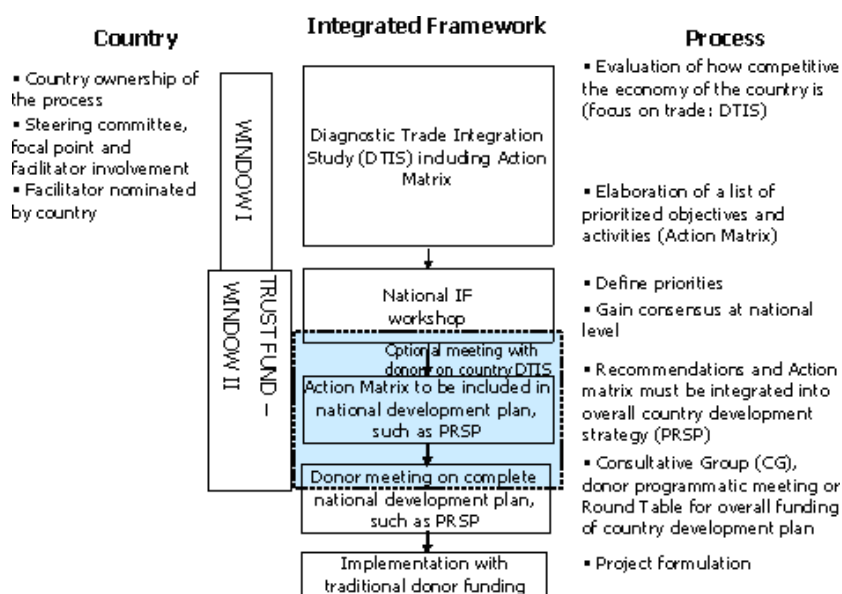
It was concluded that the best place for the Secretariat was still Geneva, inside the WTO, given the proximity of the WTO and other key actors in the development field, such as UNCTAD. It was clearly stated that the Chief Executive Officer appointed to guide the Secretariat should have received independence from the WTO. He and the Secretariat would be hosted by the WTO structure but maintain freedom of actions. In addition, the Steering Committee should provide the policy direction, evaluate progress and be the platform for exchanging the various experiences of the six agencies. The role of these

⁹ In : http://www.integratedframework.org/files/W15_Ap_III_Annex_Eng.pdf

agencies is still the most important point of the IF. To function in a correct manner the IF has to receive the in-the-field support provided by the agencies that have defined expertise and knowledge in their respective areas.

To be successfully implemented, the IF requires the fulfillment of three different levels. First, there are the preparatory activities of the request that a State should complete, a review of the request, the establishment of the National IF steering committee and, if possible, the identification of the most important donor for that specific country. Once a request has been accepted, there is the diagnostic phase that will result in the Diagnostic Trade Integration Study (DTIS). The third stage consists of the follow-up activities that transform the diagnostic activity into an action plan.

Integrated Framework Schema.



Source from: www.wto.org

It is important to note that a program that began as totally dependent on the six institutions is today also strongly linked to the individual countries. All the LDC governments have to play a very active role from the outset.

At the end of February 2007, 43 countries were at different stages using the IF. Of these 43 countries 24 have already completed the so-called Diagnostic Trade Integration Study (DTIS).

<i>DTIS Completed</i>	<i>DTIS Completed</i>	<i>Countries That Have Started/ Will Start Shortly The DTIS Process</i>	<i>Technical Reviews Under Considerations</i>	<i>New Requests</i>
Benin	Mali	Angola	Afghanistan	Capo Verde
Burundi	Mauritania	Burkina Faso	Democratic Republic of Congo	
Cambodia	Mozambique	C.A.R.	Equatorial Guinea	
Chad	Nepal	Comoros	Guinea-Bissau	
Djibouti	Rwanda	Gambia	Haiti	
Ethiopia	Sao-Tome & Principe	Niger	Liberia	
Guinea	Senegal	Samoa	Solomon Islands	
Lao PDR	Sierra Leone	Sudan	Timor-Leste	
Lesotho	Tanzania	Vanuatu	Togo	
Madagascar	Uganda			
Malawi	Yemen			
Maldives	Zambia			

Source: www.integratedframework.org

THE SIX AGENCIES

Although the six agencies should play different roles, the Integrated Framework results in a multilateral negotiation, and more specifically a multi-institutional negotiation. These are the most complex types of negotiation. Not only are there different actors, but each should play different roles and *donnent lieu à de nombreux tours de table en plusieurs endroits*.¹⁰ Before trying to understand and to delineate a real strategy for the six actors in order to arrive at a functional Integrated Framework, it is important to analyze the different six positions using the SWOT analysis. In this way it is possible to identify the most important strategic guidelines with reference to the target of having an improved integrated framework. From the following SWOT analysis it emerges a clearer definition of the different roles of the six agencies.

<i>SWOT ANALYSIS</i>	<i>Strengths</i>	<i>Weaknesses</i>	<i>Opportunities</i>	<i>Threats</i>
IMF	The most important player overseeing the global financial system. Financial means.	A discredited role in the last years especially after the criticism that	The financial support of the IMF is one the paramount element to guarantee the	To be perceived as a friend to American and European corporations.

¹⁰ Saner, R. *L'Art de la Négotiation*, Paris, 2005

		invested the Washington Consensus policies. ¹¹	success of the IF. A global and in-depth perspective of the economic monetary system that should be used to give the best advices to LDCs.	To have an economic policy not very clear (sometimes a Keynesian economic policy sometimes a totally opposite policy).
ITC	With reference to trade and development this is the best forum for all the actors related to the world of enterprises. Works in six well defined sectors.	Responds to two different agencies: UNCTAD and WTO that have different roles.	To mediate possible conflict between WTO and UNCTAD and to be the main actor with reference to trade and enterprises.	Lack of focus also on the main core activities given the dual administration of the ITC (WTO/UNCTAD).
UNCTAD	General Assembly's principal organ in dealing with trade, development and investment. A long experience since 1964.	Being associated, especially in 1970s and 1980s, with the idea of a New International Economic Order. Scarce resources and only 400 staff members.	Produce always updated know-how related to trade and development. The possibility to be the forum where developed countries and developing countries may freely speak.	An increasingly reduced role given scarce resources.
UNDP	A large budget. Largest multilateral source of development assistance in the world with experience dating back 1965.	Many fields of action: democratic governance, poverty reduction,	UNDP's support to the IF represents a crucial point of the success of the Integrated	To be frustrated with so many different and difficult fields of action although all these are

¹¹ See Stiglitz and his critique to the International Economic Institutions.

	UNDP administrator is the third ranking member of the UN.	crisis prevention and recovery, energy and environment.	Framework. To be more and more an institution where research in the field.	strictly related to development.
WB	Leading institution for providing finance and advice to countries for the purpose of economic development and eliminating poverty. Large resources to put into action plans.	A discredited role in development over the last years especially after the Washington Consensus.	Its presence in a project is the best guarantee to have funds and the support of developed countries.	Not to find within the IF its specific financial role especially vis-à-vis another very important actor (the WTO) working inside integrated framework.
WTO	The world's most important trade organization and the most important player for the implementation of the IF. 150 member states. Five major principles: <ul style="list-style-type: none"> • Nondiscrimination • Reciprocity • Binding & enforcement commitments • Transparency • Safety valves. 	Internal divisions into ever stronger trade blocs that threaten the functioning of the institution. The suspension of the Doha Development Round negotiations.	Without the support of the WTO, the integrated framework has no viable future.	An interruption of multilateral negotiations with the eventual emergence of bilateral and regional trade agreements that could really diminish the importance of the WTO.

From the above SWOT analysis becomes clear how that most important actor with respect to the IF is the WTO. Apart the fact that it hosts the IF's Secretariat, the WTO's field of action encompasses all IF goals. The IF requires a multilateral (multi-institutional) negotiation but in this case the different six agencies have all the same common goal: a perfectly functioning IF. As in all multi-institutional negotiations and different from classic bi-lateral negotiations, the situation is much more complicated and neither the conflicts nor the different roles are clearly defined.

Normally, in a multi-institutional negotiation there are five classic positions: the engine, the orchestra director, the defender, the brake and the follower. In the IF, the WTO may be considered as the engine element while the other five UN agencies may be more orchestra directors. The other three positions in the IF correspond to other minor actors. For example, a defender could be a government institution aiming to achieve only some specific gains and not paying attention to all the other issues at stake.

A distributive negotiation (i.e., winner/loser logic) does not fit with the goal of improving the IF. In fact, with reference to the IF, the negotiation is very complex given

both the number of actors and issues at stake. This makes a solution based on the concept of the distributive negotiation very unstable in the long run. As integrative negotiation is more appropriate in this case as all the parties should be satisfied with the results by the end of the negotiating process.

THE BILATERAL CHANNEL

Bilateral trade agreements can touch areas such as investments, competition, and labor – areas where it is very complicated for the WTO to arrive at the required consensus for an agreement. In a bilateral agreement there are two parties, meaning that an agreement may be reached in a shorter period of time. But analyzing these agreements from a substantive point of view it is possible to see that they are linked to short term political or geo-strategic considerations. Erroneously, developing countries think that negotiating with developed countries on the base of a bilateral negotiating process may give them some specific preferential benefits. In addition, it is true that some bilateral and regional agreements have been the basis of a certain level of commercial stability. In reality, however, bilateral agreements:

- Create a discriminatory environment for non-parties
- Can cause a diversion trade among the partners if imports from an economically inefficient regional partner displace more competitive imports produced elsewhere
- Create an incentive for further discrimination, when countries outside the agreement quickly try to conclude agreements with others that are within it so they are not excluded. This is the “domino” or “bandwagon” effect.¹²

Under this situation it is clear that the LDCs have a lot to lose from bilateral agreements. In addition:

Preferential trade agreements may also lead to the creation of political alliances, where the price that must be paid by a developing country for signing a regional trade agreement with a developed country is that it must support the broader policy stance of that country in the WTO or elsewhere. In this sense, bilateral agreements do not rectify power imbalances between partners. It is all very well if your name is Brazil, China, EU, India, or the US, but for Ghana, Cambodia or Peru, the bilateral leverage is much smaller than the multilateral one.¹³

In other words bilateral agreements are a serious problem for the trade policy of all the LDCs. However, they are proliferating after the failure of the Doha Round. Both the European Union and the United States are not willing to join the WTO's IF as it represents the loss of a certain amount of negotiating power which can be maintained if they negotiate bilaterally. The EU and the US want to keep the main Technical Cooperation in Trade at a bilateral level. Yet it written as follows:

technical cooperation is an area of WTO work that is devoted almost entirely to helping developing countries (and countries in transition from centrally-planned economies) operate successfully in the multilateral trading system. The objective

¹² Lamy, P. *Multilateral and Bilateral Trade Agreements: Friends or Foes*.

[://sipa.columbia.edu/news_events/special_events/silver_lecture/Lamy_SIPASilverLecture.pdf](http://sipa.columbia.edu/news_events/special_events/silver_lecture/Lamy_SIPASilverLecture.pdf),

¹³ Ibid

is to help build the necessary institutions and to train officials. The subjects covered deal both with trade policies and with effective negotiation.¹⁴

Obviously the European and American behavior is incompatible with the aims of the WTO and the success of the IF.

DEFINING THE ACTORS

Given the IF's structure, it is possible to see the procedural complexity. While the principle players, the six agencies are only a portion of those playing a role in establishing a specific IF. Another tier of actors is composed by the domestic institutions of the State implementing an IF, among these, the Prime Minister's office and other related ministries plus all the other State bodies promoting economic development (e.g., employers' association, trade unions, chamber of commerce, economic and trade research institutes, universities).

Another layer of actors are multi-national enterprises. They may be aligned with the the international development institutions or they can be on the opposite side. Hence, their position must be evaluated on a case by case basis.

In today's world transnational NGOs are very important global players, confronting the WTO and the IMF many times in the last years.¹⁵ Transnational NGOs actively try to influence the development of international issues sending their political recommendations to the major actors.¹⁶

Last but not least, it is important to remember the interest groups and public opinion. It is true that the public opinion is, in the majority of cases, not technically competent and that it moves the negotiation from a technical level to considerations too connected emotions. However, public opinion still plays a relevant role especially with respect to LDCs.

<i>IF's PRINCIPAL ACTORS</i>						
UN LEVEL	WTO	World Bank	IMF	UNCTAD	ITC	UNDP
DOMESTIC LEVEL	Government	Employers' Association	Chamber of Commerce	Trade Unions	Universities and economic and trade research institutes	
PRIVATE INTER-NATIONAL LEVEL	Multi-nationals Corporations	Small and Medium Companies	Public	Trans-national NGOs		

¹⁴ In : http://www.wto.org/English/thewto_e/whatis_e/tif_e/dev3_e.htm.

¹⁵ Saner, R., *L'Art de la Négotiation*. Paris, 2005, p. 238.

¹⁶ Ibid

DONORS	Public Donors	Private Donors	Public / Private Donors			
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HOW TO HANDLE THE ISSUE FROM A LEGAL PERSPECTIVE

Since 1997, the IF has not worked properly. Viewed from a legal perspective, it may be useful to divide the negotiations into different sub-problems, dealing with each separately.¹⁷ In other words, it may be simpler to face more specific problems than a big enigmatic issue. Every one of the six UN agencies could face one sub-problem according to its competencies.¹⁸ It is always very useful for negotiating parties to break a conflict down into smaller and more manageable pieces.

Among the principal problems that have emerged are:

- Scarce support by the domestic institutions in the LDCs interested in or already implementing an IF. This is in opposition to the fact that for an IF to be effective, it needs to be country-driven.
- Donors. Too often donors do not pay sufficient attention to the necessities of granting adequate resources and providing them in a coordinated fashion, resulting in the classic problems related to bilateralism
- The scope of the IF should be broadened, covering also activities important to prioritize the needs of LDCs
- A lack of coordination between the six UN agencies. It is true that they have different roles but they should work in a more harmonized way.
- The governance structure between the six agencies is still not well defined. When everyone is responsible in the end no one is responsible. Probably the WTO's role should be increased notwithstanding the new tasks of 2006.
- The July 2006 impasse of the Doha Round and the emergence of new trade blocs, characterised particularly by bilateral and regional agreements are a menace to a strong multilateral trading system.

THE AGENCIES' STRATEGIC POSITIONS VIS-À-VIS REORGANISATION

Among all the actors the ones with the power to positively impact the functioning of the IF are the six UN agencies. The others, while important, lack the power to implement a real transformation of the IF's processes. In order to get an improved IF the first step is to choose a strategy. This may be defined as "the overall guideline, indicating the direction we need to take from our wishes and needs to our objectives".¹⁹ It is important to underline that

¹⁷ Kremenjuk, V., A., *International Negotiation*, Oxford, 1991, p. 139.

¹⁸ *Ivi*, p.138. This approach was used by attorney Linowitz when he was appointed as special ambassador for 180 days with the task of finding a solution at the dispute between the United States of America and Panama regarding the Panama Canal. He basically divided the negotiating process into two different stages. In this way it was much easier to find a solution.

¹⁹ Saner, R. *The Expert Negotiator*, p. 105, 2005

in a complex multilateral negotiation such as this one with six principle actors and multiple other stakeholders, it is of paramount importance to use integrated bargaining. This approach, defined also as a “win-win approach” offers the best results given that:

- there is a variable amount of resources to be divided and both sides can “win.”
- the dominant here is to maximize joint outcomes.
- the dominant strategies include cooperation, sharing information, and mutual problem solving. This is also called “creating value” since the goal is to have both sides leave the negotiation feeling they have greater value than before.²⁰

An integrative bargaining process, especially in a case such as the IF, is the only one that may lead to Pareto Efficiency. In fact:

A goal of negotiations is to be as “Pareto Efficient” as possible. A Pareto efficient outcome is one in which there is no other agreement that would result in both parties being better off. If there is an outcome that would have made both better off, the decision reached is not Pareto efficient. Stated differently, an agreement is “Pareto Efficient” if one party cannot do better without some other party doing worse.²¹

Given the fact that the six agencies share the same objective, they have to be perfectly coordinated in order to reach the collective goal: the improvement of IF. Then each one of the six UN agencies will use a specific and differentiated strategy – competition, collaboration, compromise, avoidance and accommodation – when dealing with a specific problem. These are the classic positions taken in a conflict.²²

- *Competition* is not a cooperative act. In this case a player only pushes in order to reach their goal aiming at a distributive result. It is a zero-sum game.
- *Collaboration* is permits the parties try to find a solution together taking into consideration everyone’s the desires and interests.
- *Compromise* consists of an agreement that the parties find meeting half way. They are not entirely satisfied but the reached agreement may be considered as acceptable.
- *Avoidance* is always a possibility, but will not result into a victory. In fact, in such a situation a party, rather than continuing to try to achieve his target at a certain point removes himself from the discussion. A complete avoidance (retreat) is a strategy but a temporary avoidance is instead just a simple tactic in order to gain time.
- *Accommodation* is the 180° opposite of competition. In fact ,in this case a party decides to renounce the majority of his targets. He satisfies his opponent renouncing to some of his aims.²³

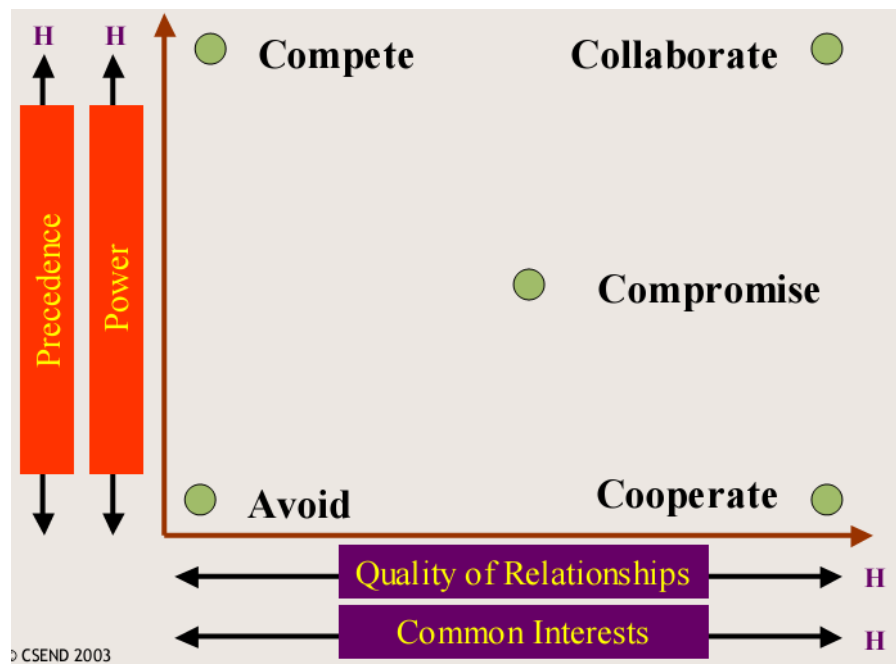
²⁰ In: <http://web.cba.neu.edu/~ewertheim/interper/negot3.htm>.

²¹ In: <http://web.cba.neu.edu/~ewertheim/interper/negot3.htm>.

²² Thomas, K.W, Kilman, R.H., *Developing a Forced-choice Measure of Conflict Handling Behavior: The Mode Instrument*, in 37 *Educational and Psychological Measurement*, 1977, pp. 309-325.

²³ Saner, R., *The Expert Negotiator*, Dordrecht , 2005. In particular, on pages 106-111 Saner gives a detailed explanation of these five conducts.

In general, the best strategy to apply is collaboration, which permits all the negotiating parties to find an agreeable solution to the problem. In other words collaboration may also be viewed as the approach that leads to a “win-win” result. One of the most important hurdles on the road to collaboration is trust. In fact both sides are always “fearful that any association with the other will taint them somehow, or that they’ll lose critical pieces of the puzzle in the debate. They both expect to have to compromise and aren’t envisioning true collaboration.”²⁴ A key point in order to collaboration is to define a process that can lead to both parties gathering around the negotiating table “with the comfort that their separate concerns will really be considered and that a truly collaborative result is possible.”²⁵



Source: Gladwin & Walter (1980) in Saner, Raymond. *The Expert Negotiator*. p. 113

The above schematic well represents the five basic positions as outlined.

Returning to the IF, despite the issues being divided into many sub-problems it is very difficult to have a unique strategy for all the agencies. In fact in such a situation, the result will not be positive. A unique strategy with different tactics can work well when there is a single player that has to reach a particular goal, but when there are six players

²⁴ Howe, J., *When 1+1=3!*, in <http://www.dovetailinc.org/DovetailComm0205.html>

²⁵ Ibid

with the same goal but who may not be sitting around the same table, it is more appropriate that everyone have their own strategy. According to Saner:

The strategy may even be defined by a movement from one position to another: “*The true policy is to confront power with power at a selected point where a decision in a military sense is possible, and then to use the delicate and unstable equilibrium as an opportunity to be seized for constructive and magnanimous negotiation.*” (Walter Lippmann, 1946)²⁶

In particular, attention should turn to one key problem previously mentioned: the suspension of the Doha Round in July 2006. This is the most urgent issue that the WTO should try to solve. If the Doha round does not restart soon the problems for the multilateral trading system will grow increasingly complex in part due to the proliferation of bilateral and regional trade agreements, threatening the continuity of the WTO’s ability to act. In addition, there is an increase in the number of commercial trade blocs that menace the WTO’s negotiations. Since 2001, the IF is linked to the Doha Round and a failure of the latter will represent a failure for the IF. Without the support of the six UN agencies, LDCs risk signing agreements unfair to their interests. These countries often do not have the capacity to trade in a profitable manner, and given that in the best case they exports only raw materials they risk being overwhelmed by the superior trade capacities of first, second and third world countries.

The WTO should act in order to restart the Doha Round. The strategy it may use to reach this goal is principally compromise. All the trade negotiations related to the rounds - before under the GATT now under the WTO - have been principally based on the strategy of the compromise. Moreover, today that on the international arena there are more strong actors (the blocs inside the WTO) any other strategy that be based not on compromise risks to be very dangerous leaning towards a total failure.

The WTO and the other UN agencies have more strategic options available such as involving more broadly the LDCs’ governing institutions. It is important to specify again that the first move for an IF is the request submitted by an individual country to the IF’s Secretariat. As mentioned, given the political and governance challenges in many LDCs, (corruption, weak or lack of democratic institutions, etc.) there is more room for other strategic approaches by the UN agencies vis-à-vis LDCs. These could include competition. In fact, with the help of NGOs and public opinion, the agencies can place a lot of pressure on discredited regimes. In other cases, where the political institutions of an LDC are less challenged and more trustworthy, a collaborative strategy may be fruitful.

With reference to all the other issues related to the IF, the strategy to use may be very different depending on the specific situation and actors involved.

CONCLUSIONS

From the analysis conducted it emerges that the WTO plays the most significant role in the IF, when compared to the five other UN agencies. Indeed the WTO is, amongst all of them, the one with the most power. Second to the WTO there two other powerful institutions: UNCTAD and ITC. Together with the WTO these two institutions form the United Nations structure addressing international trade. Actually, the principal point regarding the IF is to have, as soon as possible, the Doha Round restarted. With reference to the Doha Round – a

²⁶ *Ibid*, p. 123.

multilateral negotiation – at the moment the only viable strategy for the WTO but for the WB, IMF, UNCTAD and UNDP as well, is compromise. The other problems in which the issue of the IF has been divided permit the six UN agencies to apply different strategies. Clearly, which strategy is correct depends on a case-by-case analysis. What is certain is that the IF is an example of a multilateral negotiations where the six principal actors stay on the same side of the table and that if there is only a minimum difference between these six agencies with reference to the targets to be achieved it is obvious the IF will be a total failure.

Appendix 1: Some of the characteristics of legal approaches

- Decision based on reality, not assumptions
- Clear understanding of facts
- Agreements reached in stages
- Agreements reduced to written form
- Trust built in incremental steps
- Use of clear, concise terms
- What is said being listened to, in context
- Attention to detail
- Clear identification of issues
- Comparison of perception of facts and issues with objective, legal standards
- Division of complex issues into manageable pieces
- Support instilled for peaceful resolution of conflict through legal processes

Kremenjuk, V., A., International Negotiation, Oxford, 1991, p. 147.

APPENDIX 2: SUMMARY OF THE VARIOUS FIELDS OF ACTION OF THE SIX MAIN ACTORS
(WTO, WB, IMF, UNCTAD, UNDO, ITC)

International Monetary Fund (IMF)	Promotes: <ul style="list-style-type: none"> • international monetary cooperation • exchange stability • economic growth • employment • temporary financial assistance to countries to help ease balance of payments.
International Trade Center (ITC) (cooperation agency in collaboration between WTO and UNCTAD)	Works on trade development with reference principally with enterprises.
United Nations Conference on Trade and Development (UNCTAD)	Promotes: <ul style="list-style-type: none"> • the development-friendly integration of developing countries in the world economy
United Nations Development Program (UNDP)	Raises awareness, track progresses and connect countries to the knowledge needed to reduce: <ul style="list-style-type: none"> • poverty • hunger • disease • illiteracy • environmental problems
World Bank (WB)	Fights poverty and tries to improve living standards for the people living in developing countries
World Trade Organization (WTO)	The only one organization dealing with the rules of trade between countries

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RUSSIA'S ACCESSION TO THE WORLD TRADE ORGANIZATION

Samar Bajaj

ABSTRACT

This chapter examines a complex set of politico-economic and legal negotiations—the Russian Federation's accession to the World Trade Organization (WTO). An eclectic methodology is adopted, one that focuses on a behavioral, qualitative approach as opposed to a technical, quantitative analysis. A brief description of the formal procedure for WTO accession is provided, together with a recap of some of the main issues under discussion. Next, the key actors are classified using two approaches (1) a sociological one—emphasizing observed behavior and (2) a political one – based on allegiance, private interests and pressures at home. Outlining these varied positions leads to five distinct “conflict futures,” mapped along a spectrum of compromise. A suggested action plan for each scenario anchors this analysis in the policy space.

INTRODUCTION

Russia's bid to join the World Trade Organization (WTO) is not exactly breaking news, but it's news all the same. The Russian Federation first applied for WTO membership in 1993, but it is under the leadership of current President Vladimir Putin that the process has acquired a sense of urgency and purpose. As the largest economy outside the 149-member club, entering the WTO is both an economic and a political ambition for Russia. After more than a decade of talks, Russia is currently negotiating the precise terms of accession with other member states. While the proceedings have made significant progress, disagreement over a number of key issues has cast a shadow of doubt over exactly when, and at what cost, Russia will accede.

This analysis examines the issue of Russia's accession to the WTO and constructs a “Conflict Futures Forecast” that explores the possibilities for the end of negotiations. The issue is no doubt complex and often technical, and it would be futile (if not physically impossible) to list all the facts of the case within a limited space. A behavioral approach will be adopted in an attempt to decode why actors act the way they do and thus expose some of the underlying motives. Russia's move to join the WTO stems from (1) the desire to belong to a wider world community and (2) the need for prestige and recognition. Saner provides a cogent argument for negotiators to acquaint themselves with the needs and motivations that drive the other party, especially since it makes passing “from purely distributive bargaining to a mutually favorable exchange”¹ possible. In that spirit, this analysis takes a four-step approach. First, it outlines the technical and procedural aspects of the accession process. The next section highlights the issues that have proved particularly challenging, while the third part evaluates various actors and their respective positions. The fourth and final element maps out five hypothetical scenarios based on different combinations of strategy, and suggests an appropriate policy response where applicable.

¹ Saner, Raymond, *The Expert Negotiator*, Martin Nijhoff Publishers 2005, Ch 3, p. 65

THE ACCESSION PROCESS

According to established WTO procedures, the accession process is initiated by the formation of a Working Party that consists of all interested members states. Figure 1 provides the initial list of 50 Working Party members for Russian accession, although the group now includes 58 countries. Russia's chief negotiator is Maxim Medvedkov, from the Russian Ministry for Economic Development and Trade while the current Chairman of the Working Party is an Icelandic trade official, Stefan Johannesson.

Accession negotiations run along two distinct tracks – the country in question must (1) arrive at a multilateral agreement on the enforcement of WTO rules and disciplines within its borders and (2) engage in bilateral talks regarding market access with all interested Working Party members². While the multilateral negotiations are interesting in their own right, this paper will focus on the bilateral elements (especially between Russia and the US), since they allow a clearer understanding of the issues at stake the parties concerned. Moreover, the concerns voiced during bilateral negotiations often mirror those being debated at the multilateral stage, and hence bilateral talks provide a good micro proxy for developments at the macro level.

Once both tiers of talks have concluded, the “accession package” is adopted at a final formal meeting of the Working Party³. These documents are then presented to the General Council for approval, following which the applicant country signs the Protocol of Accession and receives full membership of the WTO.

Of course, on paper the process sounds much simpler than how it actually plays out. Member states often try to drive distinctly national agendas during both bilateral and multilateral level talks, and the applicant country's position is likely to be diametrically opposed to these. So the eventual success of negotiations hinges on the resolution of critical issues coming to the fore through the articulation of dramatically different stands. The next section outlines some of the specific issues that have been prominent during the Russian accession process.

SALIENT ISSUES

Nearly a decade after the establishment of the Working Party (1997), several thorny issues still remain to be settled. The most controversial of these include access to Russian markets in the financial services and telecommunications sector, tariffs on agricultural products like meat and sugar, access to the market for civil aircraft and automobiles, obligations to respect intellectual property rights, as well as Russia's antagonistic trade policy toward its immediate neighbours (i.e. Georgia and Moldova). In order to precisely map the competing interests of different parties, this section discusses two of the six aforementioned “seeds of discontent” in greater detail.

² ‘How to Become a Member of the WTO’, World Trade Organisation,
http://www.wto.org/English/thewto_e/acc_e/acces_e.htm

³ Ibid.

Financial Services

Russia's response to the demand for greater liberalization of its financial services sector (notably the banking and insurance industries) has been unenthusiastic. The United States in particular has launched an aggressive campaign calling on Russia to open up key service sectors, especially since developed countries like the US and EU possess significant comparative advantage in these areas. Inside Russia, both banking and insurance remain underdeveloped and highly concentrated around urban centers – particularly Moscow and St. Petersburg. Most deposits are held by two entities, Sberbank and Vneshtorgbank,⁴ both of which are majority public-owned. This has meant cross-subsidization, i.e. resources being redistributed from urban consumers (who pay very high interest rates of around 18-25%) toward poorly serviced rural areas. In the event that foreign banks can compete freely, the big Russian players will no longer be able to maintain their dual-pricing structures. While the US argues that foreign participation in the sector will lead to increased competition and more creative ways of meeting Russia's banking needs, the Russian contingent insists that if the national champions are driven out of business then rural consumers will stop receiving credit altogether. A similar case has been made for the insurance industry, where restrictions on foreign participation are prohibitive. During the Soviet era, insurance was deemed unnecessary, since health, education and housing services were provided universally by the State. Following the collapse of the Communist regime, a few domestic companies have entered the business. Ingosstrakh (International State Insurance) and Rosgosstrakh (Russian State Insurance) are the two dominant players, but once again coverage remains unequally distributed and regionally imbalanced⁵. Currently there are limits on investment by foreign insurance companies in mandatory insurance provision (e.g. life and auto insurance), which forms the bulk of insurance contracts in Russia. External pressure for the liberalization of insurance is strong, especially with powerful multinationals such as AIG (American International Group) and Germany's Allianz AG leading the campaign. Insurance companies from the US and EU are keen to exploit the size and potential that the Russian market offers. The gulf between Russia and other Working Party members remains wide on this issue, yet it is unclear how long Russia will be able to maintain its position since no country has to-date acceded to the WTO without making concessions related to branching for financial services companies⁶ – Saudi Arabia being a particularly recent yet revealing example.

Agriculture

Trade in primary products is another area where talks have not significantly progressed. Russia's stand on further liberalization in agriculture continues to be negative, despite the fact that agriculture accounts for a tiny fraction of Russian GDP. Imports, especially of meat and dairy products, have risen exponentially (Figure 2) and Russia argues that opening up its market would result in even greater food dependency. The Russian government has thus chosen to address the issue domestically as opposed to evaluating it with respect to comparative advantages in world trade. Tariff quotas on a range of

⁴ Vedev, Alexei, 'Russian Banking System: The Current State and the Prospects for Future Development', *Trade Policy and WTO Accession: A Training of Trainers Course for Russia and the CIS*, World Bank 2005

⁵ 'Telecommunications and Financial Services', *Summary of WTO Working Group Meeting*, US Russia Business Council

⁶ 'Update on Russia's WTO Accession/ PNTR Campaign', US Russia Business Council

agricultural products have been introduced to stabilize the import surge. As part of its terms of accession, Russia is seeking the use of tariff barriers for a six or seven year transition period in order to allow domestic producers time to consolidate and become competitive in international markets. Meat and dairy product exporters in the US are strongly opposed to these quotas and restrictions, since the Russian market accounts for 40% of their total export market. Given the strong agricultural lobby, this is a particularly fractious issue that threatens to “fowl up” Russia’s accession negotiations unless resolved promptly.

THE ACTORS

The challenges and complexities of negotiation are amplified at the multilateral level due to two main reasons: (1) the multiplicity of actors involved and (2) the diversity of goals being pursued simultaneously. Saner explains attempts in social scientific research⁸ to distinguish various *kinds* of actors that are party to multilateral negotiations: drivers, conductors (or managers), defenders, brakemen, and cruisers (Zartman, 1994).

Smith adopts a different classification to analyze the underlying dynamics⁹ of the negotiation and the forces that rock Russia’s accession boat. He defines five kinds of political pressures surfacing from different actors: (1) The Consolidationists (2) Mercantilist, Trade and Investment Interests (3) Economic and Humanitarian Interests (4) Geopolitical Interests and (5) Political Conditionalists.¹⁰ The *Consolidationists* would enthusiastically support Russian accession and argue that the WTO would function far more effectively if it had more diverse membership and broader scope for its rules. *Export and investment groups* also support early accession for emerging economies like Russia, in order to gain easier and more predictable access to large potential markets. *Economic and humanitarian interests* stem from the welfare needs of developing country residents, and it is believed that Russia’s gains from trade could significantly enhance the resources available for social cohesion. At the same time these interests are not opposed to the infant industry argument and/or domestic protection in principle, and would be prepared to evaluate such demands positively if it is seen to improve regional inequality and/or access for the eight marginalized. *Geopolitical interests* view economic integration as a way of promoting a stable world order, but are not opposed to using the “carrot and stick approach” i.e. dangling the carrot of economic integration in return for sizeable political concessions. The Ukrainian and Moldovan threats to veto Russian accession are a germane example, where the two nations are demanding the withdrawal of barriers in return for providing political support to the accession process. The final category encompasses the *Political Conditionalists* who adopt a “show me” approach – developing nations must prove their commitment to democracy and human rights in return for trading benefits. They aim to tie WTO accession into a package deal, but dangers abound in this approach since politicizing the accession issue could set off a nationalist backlash in transition economies and undermine the interests of both Consolidationists and Investors.

⁷ Stokes, Bruce, ‘Fowling Up Russia’s WTO Accession’, *Journal Article*, Council on Foreign Relations 2002

⁸ Saner, Raymond, *The Expert Negotiator*, Martin Nijhoff Publishers 2005, Ch 11, p. 213

⁹ Smith, Murray G., ‘Accession to the WTO: Key Strategic Issues’, *Institute for International Economics*, pp. 173-175

¹⁰ Ibid.

Next, we list the key participants in the issue under study, and try to use both the social scientific and the political classifications to better evaluate what *kind* of actors we are dealing with (Annex, Figure 3). A more detailed breakdown of the demands by each individual nation and a list of counterarguments are provided in the Annex (Figure 4).

Russian Government: (Driver, Defender)

While WTO membership has been a strategic foreign policy goal for Russia under the Putin presidency, the stance of the Russian negotiating team is neither simple nor straightforward. This is because it reflects the complexities of Russia's domestic politics and the different "circles" around the President with their competing foreign policy agendas¹¹. The "family" or old Yeltsin team consists of both political oligarchs and businessmen and so their interests remain divided – the economic liberals and the academic community strongly support accession while the security clique is emphatically opposed. Amongst the Ministries, those of Economics and Finance tend to *drive* trade liberalization whereas the Defense Ministry attempts to *defend* nationalist policies. The Russian public remains woefully uninformed and unaware of the key issues surrounding accession, and hence has not been mobilized by either side. These contradictory forces at work explain why Russia plays part driver, part defender during the negotiations – a single position is inadequate as there needs to be a balance between powerful yet opposing interests back home.

Russian Business Sector: (Driver, Defender, Mercantilist, Trade and Investment Interests)

The negotiating position adopted by Russian industry is split between sectors that have a competitive advantage in the international arena (*drivers*) including energy giants such as Gazprom and the big steel producers. However, the Russian industry is also riddled with Soviet era firms that still receive state subsidies, are subject to soft-budget constraints and insider control, indulge in rent seeking and do not conform to international accounting standards. These include sectors like financial services, telecommunications and agricultural production that receive government protection and naturally resist accession unless they are provided with special treatment (*defenders*).

United States of America: (Drivers, Brakers, Consolidationists, Mercantilist, Trade and Investment Interests, Geopolitical Interests, Political Conditionalists)

The official position of the US contingent (led by Dorothy Dwoskin, Assistant US Trade Representative for WTO and Multilateral Affairs) has been aggressive and demanding. In an attempt to accommodate pressure from domestic lobbies consisting mainly of *export and investment interests*, the US has often threatened a veto (*brakers*) unless Russia implements extensive legislation and liberalizes the domestic market significantly. Some representative demands include allowing greater foreign participation in the financial services and insurance sectors, applying a legislative framework within Russia that respects Intellectual Property Rights (IPRs) – since most IPRs belong to US entities – a reduction of tariffs and quotas in agricultural products like meat and poultry, etc. The US government on the other hand, has strong *geopolitical motives* for encouraging Russia's accession (*drivers*), since it would promote greater predictability in the world trading order as well as in international relations. But the *political conditionality* facet of US foreign policy is never far behind and

¹¹ 'The Domestic Policies of Russia's Foreign Economic Policy', *Meeting Transcript*, Council on Foreign Relations 2003

Russia has repeatedly been asked to (1) foster democracy at home and (2) support US military operations abroad, in exchange for trade talks to move forward.

European Union: (Drivers, Defenders, Consolidationists, Mercantilist, Trade and Investment Interests)

The EU's proximity to Russia and the Union's strong interests in greater Russian integration into the world trading system has led to a relatively more conciliatory stance from the EU Trade Commissioner. A bilateral agreement has already been signed, and consensus was generated largely on the basis of an arrangement to gradually eliminate the dual pricing of energy supplies. Then EU Trade Commissioner and now WTO Director-General, Pascal Lamy and the Russian Minister for Economic Development and Trade, German Gref signed a landmark deal in 2004, detailing market access for European exports as well as a gradual phasing out of subsidized fuel prices for domestic Russian producers¹². Details on the key elements and exact terms of the agreement are provided (Annex, Figure 5). The stark differences between the aggressive, demanding posture of the US and the relatively engaging, cooperative stance of the EU holds key lessons for the evolution of negotiations, and what we could expect in the future.

Georgia, Moldova & Ukraine (Defenders, Brakers, Geopolitical Interests)

The countries lining Russia's vast borders have always harbored problematic relationships with their mammoth neighbor. Georgia and Moldova both have a set of concerns they would like to see addressed before they provide official approval to Russian accession at the Working Party level. Ukraine looks ready to join this list, as it is likely to accede to the WTO before Russia. Strained political relations could thus filter into the realm of international trade. The key demands of Georgia, Moldova and Ukraine relate to unilateral bans imposed by Russia on imports originating in these countries, especially wine, meat and dairy products. (The pretext has been health and safety measures, while the exporting countries argue the ban is politically motivated.) Georgia has also solicited Russia's support in regaining control over the breakaway regions of Abkhazia and South Ossetia in exchange for full Georgian support for accession. Thus in Russia's immediate neighborhood, *geopolitical interests* will not only *defend* their positions, but may be willing to *brake* the accession process if they view it as too unfavorable to their national agendas.

WTO (Conductor/ Manager, Consolidationist)

All is not lost, however. Within this multitude of nationally motivated actors bargaining for a host of diverse issues, there is one actor seeking to produce an agreement from a neutral perspective.¹³ This is the WTO itself, although the proceedings often seem to move at a snail's pace, considerable progress has been made. The effort comes from the WTO's genuine interest in expanding its membership and broadening its scope, i.e. its consolidationist point of view.

We now have a more nuanced understanding of the different parties involved and their respective positions. But so far this has been a background discussion, and any policy

¹² 'EU-Russia deal brings Russia a step closer to WTO membership', *Press Release*, European Commission 2004 http://ec.europa.eu/comm/external_relations/russia/intro/ip04_673.htm

¹³ Saner, Raymond, *The Expert Negotiator*, Martin Nijhoff Publishers 2005, Ch 11, p. 212

relevant analysis must incorporate prospects for the future. The fourth and final part of this paper builds and describes scenarios for the possible evolution of conflict, and each description is followed by policy recommendations and suggestions for appropriate negotiation strategies.

SCENARIOS

Instead of adopting the 2 x 2 matrix methodology to generate scenarios using key uncertainties, here possible futures are placed along a spectrum (Annex, Figure 6) with one end corresponding to (1) a breakdown in negotiations i.e. Russia fails to accede (because demands were too onerous) and the other limit equivalent to (5) Russia's full accession (with almost no major conditionalities). Three possibilities exist in the middle: (2) Russia accedes after a long wait i.e. a significant domestic transition period, (3) membership is achieved thanks to major concessions made by Russia or (4) that a win-win political-economic deal is reached between the major parties.

Scenario 1: Complete failure of accession talks

If all parties concerned decide to indulge in competitive behavior, there is a strong possibility that negotiations could break down completely. Using Gladwin and Walter's analysis, "Competitive" actions are a result of high outcome stakes, an uneven balance of power, and a situation where all groups tend to be assertive in demanding concessions¹⁴. While Working Party members like the United States have full right to insist on significant changes within Russia's domestic economy before it can accede, a categorical "no, unless you do this" may not be the best approach. Some of the past rhetoric has lent evidence to a possible failure of talks in the future, especially the renewed 10-point set of claims by the United States and Russia's response: that the US was "deliberately" delaying the accession process. Of course it cannot be stressed enough that the failure of talks would have serious repercussions for international politics.

Policy response

The multiplicity of diplomatic actors¹⁵ in complex negotiations like WTO accession talks means that official positions often lose simplicity and become entangled in an intricate web of competing objectives. Indeed, given the operation of the numerous political driving forces discussed by Murray, there are likely to be many parties playing diplomatic roles. These include economic and commercial diplomats from the nation-state side, corporate and business diplomats from the private sector, as well as non-profit and non-governmental interests¹⁶. Thus a key strategy must be to control the manifold interfaces, and this responsibility rests on the leader of the delegation. The worst-case scenario of failed negotiations has an implicit lesson to be learnt – coordination, both internal (among members of the same party) and external (with members of other parties) is critical.

¹⁴ Ibid., Ch 5, p. 113

¹⁵ Ibid., Ch 11, 218

¹⁶ Ibid., Ch 11, p. 219

Scenario 2: Delayed accession, major domestic restructuring

When all parties employ a competitive and aggressive strategy, it is likely that negotiations will breakdown completely. A less engaging and more avoidant strategy may have worked, as sometimes it is highly advisable to “to duck away at the right moment than to experience (major) disappointment later.¹⁷” Thus a possible direction in which negotiations could evolve is for Russia to step back from accession for a period of time, and renew its bid once domestic conditions are more favorable. This would buy the government time to build a larger support base as well as to implement legislation (on IPRs, for example) that would substantially smooth the accession process later on. It would also allow Russian firms to improve competitiveness and enhance productivity, further reducing protectionist pressure in a future membership bid. This solution finds the support of numerous academics who advocate the development of a National Business System (Annex, Figure 7) that would equip Russia with the preconditions for WTO accession. The counterargument rests on the claim that Russia tried and failed to restructure its domestic economy several times, and WTO membership could in fact act as a catalyst for reform.

Policy Response

When a negotiation is particularly complex and certain issues come to acquire a degree of intransigency and intractability, it is better to move away (i.e. withdraw or disengage) rather than to stay still¹⁸ (propose solutions or reason with the opponent). Pulling back temporarily may allow all parties to re-examine the situation and consider making new concessions. In the meanwhile, the national government would be able to capitalize on this window to implement legislation strengthening Russia’s case for membership. The National Business System approach could prove instrumental in this respect, since it promotes major changes (albeit in a holistic manner) in fields as diverse as Corporate Governance, Labour Governance, Human Capital Development, Trade Policy, Technology Policy and Industry Policy¹⁹.

Scenario 3: Major concessions by Russia to gain accession

In the hypothetical scenario that Russia pursues the goal of “accession at all costs” and concedes to all possible prerequisites being demanded, major domestic legislation will be required to bring the country up to par. This will entail a complete overhaul of the current system, and huge costs for the national administration. Although this scenario is a little extreme to be likely, we could expect a future close to it, where considerable pressure on Russia may cause the negotiating team to fold in to unreasonable demands. The push-pull dynamics may once again be analyzed through Gladwin and Walter’s typology where Russia’s strategy happens to be highly accommodative while its negotiating partners pursue extremely competitive and assertive national agendas.

Policy response

Policy analysts have argued that neither a no-strings-attached WTO accession nor retaining protectionism and staying out of the trade organization is likely to have a favorable impact on the Russian economy. The accession process needs to be supplemented with structural

¹⁷ Ibid., Ch 5, p. 110

¹⁸ Ibid., Ch 8, p. 174

¹⁹ Rangan, Srinivas, ‘Russia and the WTO: A National Business System Perspective’, Babson Insight

reforms, most notably through enhancing labour mobility²⁰. Perhaps yielding to major concessions could be the appropriate shock for initiating reforms at home. In this spirit, the Council for Economic and Financial Research, a prominent Russian think tank provides a concrete proposal for improving labour mobility (Annex, Figure 8) to help the nation cope better with the difficulties of adjustments mandated for accession. If Russia's negotiating partners are successfully able to employ tactics such as imposing harsh time constraints, delaying talks until the last moment, using threats or forcing the adoption of high minimum standards,²¹ the conflict may well evolve in this direction. In this case it would be useful for the Russians to adopt a more confrontational rather than submissive stance, but given the multilateral context, external pressures and multiple interfaces often do not allow the freedom and leeway a nation would like to have. The broader implications of this scenario thus have considerable analytical value for nations who must yield.

Scenario 4: Russia accedes, backed by political-economic deal

So far our forecasts for the future have been quite cynical, involving lose-lose or win-lose situations for the parties involved. But "a really successful negotiation leaves no losers²²" and the fourth scenario is founded on this philosophy. Once again, our simplified strategy grid talks about the likelihood of a "creative" solution when all sides are willing to behave "collaboratively". Since WTO accession is a multi-dimensional process, an integrative solution becomes possible given "the presence of several issues that can be negotiated as a package."²³ It will be important to estimate the position of each party, as we will only be able to "create value" if we know what is important and to whom. For example, timing is a crucial issue for Russia (as rapid accession would be perceived as a symbolic victory) whereas for the nation's trading partners, timing could be given up in exchange for more concrete concessions in market access.

Policy response

Although it is hard to outline a "one size fits all" solution that would result in the above mentioned future, it is nevertheless possible to set a few guidelines based on which negotiation behavior can be modeled. Building trust is vital, and the current atmosphere of animosity and competition needs to be mitigated. In addition, it could be instructive to link concessions in order to arrive at "a mutually advantageous trade-off."²⁴ However this approach is not without its drawbacks since a single undertaking approach that balances conflicting interests is time consuming and often elusive. In this respect, the use of "creative grey areas" can prove effective since it allows each party some margin of manoeuvre within the agreed-upon text. The "constructive ambiguity" upon which WTO language is based provided a good example, and perhaps allowing a little vagueness into the terms of accession may leave both parties feeling accomplished. Another means to exploit differences in valuation is to grant Russia politically figurative but strategically crucial concessions (such as exemption by the US from the outdated Jackson-Vanick restrictions) in return for tangible economic concessions in eliminating agricultural quotas

²⁰ 'Russia in the WTO: Myths and Reality', Centre for Economic and Financial Research 2001

²¹ Saner, Raymond, *The Expert Negotiator*, Martin Nijhoff Publishers 2005, Ch 6, pp. 134-139

²² Ibid., Ch 4, p. 81

²³ Ibid., Ch 4, p. 82

²⁴ Ibid., Ch 4, p. 102

for example. This will allow both parties to return home with a symbolic victory and would considerably ease the backlash against the loss of other privileges.

Scenario 5: Russia accedes, concedes minimally

The other far end of the futures spectrum tends to the possibility of Russia being in the “winner take all” position at the end of accession negotiations. Once again, extreme scenarios do not provide much predictive appeal but remain valuable from an analytical perspective since they allow us to evaluate strategies that move talks closer to one end or the other. For Russia to conclude accession talks without making any major concessions, it would have to adopt a very competitive, confrontational and aggressive position, followed by intense bargaining to reach a set of predetermined goals. The posture of the other nations must be equally inclined toward conciliation, cooperation and maximum possible accommodation of Russia’s interests (even if at the expense of one’s own aims). This scenario can also be viewed as an outcome of distributive bargaining, where one party has cornered the maximum possible concessions, i.e. all the advantages contained in the Zone of Possible Agreement²⁵ (ZOPA). The final point stands at the edge of the ZOPA where concessions have been completely one-sided and one of the parties has been forced all the way down to their reservation price.

Policy response

No doubt this scenario looks extremely attractive from a Russian vantage point. To gain everything and lose nothing does signal a triumph for the negotiator. But one must be alert to the long-term consequences²⁶ of such behavior, since too hard a taskmaster may render other parties unwilling to engage or participate in the future. Thus a favorable immediate outcome could in fact prove to be a strategic blunder for Russia’s long-term ambitions.

CONCLUSION

Generating possible futures to describe how conflicts evolve is an immensely instructive way to see the “big picture.” To look at an ongoing negotiation not just in terms of what *is* but also with reference to what *could be*, allows us to evaluate our options with a long-term vision. This paper constructed scenarios for Russia’s accession to the WTO, where possibilities lay along a spectrum ranging from a breakdown of talks to full, effortless accession. Indeed the extremes exist more for imparting a symbolic distinction between futures while the middle gives us a more realistic picture of where the negotiations could lead. The key differences exist in the behavioral strategy that a participant can adopt, and the crux of the paper revolves around the interaction of these varying strategies to produce different combinations in the context of outcomes.

Negotiation is all about finding solutions to problems, and this paper attempts to recommend possible solutions to each scenario. In the case of a complete breakdown in talks, the Russian negotiators would gain from organizing the large assortment of interfaces that they must reconcile. The adoption of a long-term National Business Strategy could be an appropriate policy response if Russia decides to pull out of talks and delay accession for a while. On the other hand, if external pressures compel Russia to make major concessions

²⁵ Ibid., Ch 2, p. 42

²⁶ Ibid., Ch 2, p. 61

in order to accede, implementing policies to improve labour mobility could alleviate the adverse economic impacts of liberalization. There is also the possibility of a creative solution, where political concessions to Russia could be exchanged for economic benefits for member countries. A final possibility is that of an effortless and immediate accession for Russia, and although the prospects of bullying fellow nations into submission may bring short run gains, it is likely to be detrimental in the long-term.

Given the extensive coverage that Russia's bid for membership has received, an open-ended discussion of the issue sheds light on the multitude of concerns that the process encompasses. As for what will *actually* happen, perhaps it is judicious to leave breaking news to what it does best.

ANNEX

*Figure 1**Working Party on Accession of The Russian Federation*

Chairman: H.E. Mr. W. Rossier
(Switzerland)

MEMBERSHIP

- | | | |
|---|----------------------|-------------------|
| 1. Argentina | 18. Hong Kong, China | 35. Peru |
| 2. Australia | 19. Hungary | 36. Philippines |
| 3. Bolivia | 20. India | 37. Poland |
| 4. Brazil | 21. Indonesia | 38. Romania |
| 5. Brunei Darussalam | 22. Israel | 39. Singapore |
| 6. Bulgaria | 23. Japan | 40. Slovakia |
| 7. Canada | 24. Korea | 41. Slovenia |
| 8. Chile | 25. Kuwait | 42. South Africa |
| 9. Colombia | 26. Malaysia | 43. Sri Lanka |
| 10. Costa Rica | 27. Mauritius | 44. Switzerland |
| 11. Cuba | 28. Mexico | 45. Thailand |
| 12. Cyprus | 29. Mongolia | 46. Tunisia |
| 13. Czech Republic | 30. Morocco | 47. Turkey |
| 14. Ecuador | 31. New Zealand | 48. United States |
| 15. Egypt | 32. Norway | 49. Uruguay |
| 16. El Salvador | 33. Pakistan | 50. Venezuela |
| 17. European Communities and
member States | 34. Panama | |

Terms of Reference:

To examine the application of the Government of the Russian Federation to accede to the World Trade Organization under Article XII and to submit to the General Council recommendations which may include a draft Protocol of Accession.

World Trade Organization

wt/acc/rus/1/rev.4 dated: 12 December 1997
(97-5448)

Source: http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm

Figure 2

Growth in Agricultural Imports (Russia)

	1999-2000 (thousand tons)	2001-2002 (thousand tons)	% Increase
Butter Imports	36,000	136,000	377%
Pork Imports	200,000	600,000	300%

Source: 'Russia's Accession to the WTO', WTO Status Report, *US Russia Business Council*, adapted from a speech delivered by Andrei K. Kushnirenko (Director of the Department for Tariff Policy & Domestic Market Protection, Ministry of Economic Development & Trade),

Figure 3

Grouping Actors by Behaviour & Motive

<i>Actor</i>	<i>Social-Scientific Role</i>	<i>Political Motives</i>
Russia (Government)	Drivers, Defenders	-
Russia (Businesses)	Drivers, Defenders	Mercantilist, Trade and Investment Interests
United States	Drivers, Brakers	Consolidationists, Mercantilist, Trade and Investment Interests, Geopolitical Interests, Political Conditionalists
European Union	Drivers, Defenders	Consolidationists, Mercantilist, Trade and Investment Interests
Georgia, Moldova, Ukraine	Defenders, Brakers	Geopolitical Interests
WTO	Conductors/ Managers	Consolidationists

Source: Zartman, 1994 in Saner, Raymond, *The Expert Negotiator*, Martin Nijhoff Publishers 2005, Ch 11, p. 213
 Smith, Murray G., 'Accession to the WTO: Key Strategic Issues', *Institute for International Economics*, pp. 173-175

Figure 4
Country Positions & Counterarguments
Country Position Counterargument/Concession

<i>COUNTRY</i>	<i>POSITION</i>	<i>COUNTERARGUMENT/ CONCESSION</i>
Russia (Maxim Medvedkov)	WTO Entry: Key Foreign Economic Goal for 2006 After China, Saudi Arabia accession - Russia only major economic power left out Joining the WTO not a goal in itself, what matters is the quality of our accession (Putin) Has already implemented a new customs code to fall in line with WTO rules Promises to bring tariffs down to single digits, and reduce barriers to trade and investment Wants Jackson-Vanik revoked (US-specific demand) Needs to Conclude Bilateral Agreements with US, Australia, Switzerland and Colombia Has concluded Bilateral Agreements with the EU, China and Japan Not prepared to be as "liberal" as Ukraine in granting concessions Miffed at Ukraine being given the "express" lane in Accession Negotiations Wants more protection for its service sectors e.g. Financial Services Fears that its enterprise are not competitive enough and may be threaten by takeovers or bankruptcy (Mayor of Moscow, Yury Luzhkov) But joining WTO beneficial for Russia's raw material industry	Russia must make significant changes to economy Further concessions required Further concessions required US ties this to Russia's stance on Iran, development of democracy and operations of public organisations Each country has specific concerns that need to be addressed EU-Russia agreement (2004) based on eliminating dualpricing in fuel All WTO members must satisfy the same minimum criteria Ukraine more willing to fall into line No country has acceded without allowing some measure of foreign participation in Financial Services Increased competition will drive out unviable firms and Russia will trade on comparative advantage US Steel producers have voiced concerns

	<p>Russia expects WTO membership to boost steel industry exports</p> <p>Wants to push the Common Economic Space (CES) with Kazakhstan, Belarus and possibly Ukraine as a possible alternative to economic integration, given hurdles to WTO accession</p> <p>State support for agriculture, Tariffs and Quotas on some food products</p> <p>Need to provide infant automobile industry</p>	<p>Regional Trade Agreements (RTAs) need to be compatible with WTO norms</p> <p>Agricultural exporters demand greater market access</p> <p>Investment agreements in the car industry</p>
WTO Working Party (Stefan Johannesson, Iceland)	<p>"Technical Issues" stalling multilateral talks</p> <p>Bilateral Negotiations with individual trading partners proceeding quite well</p> <p>Create adequate regulatory framework against counterfeiting and copyright abuse</p>	<p>WTO accused of "moving the target"</p> <p>Major disagreements remain with the United States</p> <p>Russia acknowledges this as a fair demand</p>
United States (Dorothy Dwoskin)	<p>10 point letter from Bush to Putin outlining demands</p> <p>Liberalising Financial Institutions</p> <p>Financial Services: Liberalising Russian Insurance Industry, allowing foreign firms to establish branches</p> <p>Financial Services: Liberalising Russian Banking Sector, allowing foreign banks to establish direct branches not just through subsidiaries (US has historically never compromised on this demand with any other country)</p> <p>Allowing US Agricultural Products into Russian Market, revoke Duties on Meat and Poultry Imports</p> <p>Reducing Duties to allow US Agricultural Machinery to enter Russian Market</p> <p>Reducing Duties to allow US Aircraft and Aircraft Engines to enter Russian Market</p> <p>Intellectual Property Rights: Piracy of software, films and music</p> <p>Agricultural producers want more scientific food and plant safety standards</p> <p>Wants liberalisation of Russia's telecom</p>	<p>Seen as a "deliberately" derailing Russia's bid</p> <p>Financial Sector strategic yet underdeveloped, needs protection till it becomes internationally competitive</p> <p>Russia has increase the permitted holding stake for foreign firms increased from 25% to 50%</p> <p>Russia has increase the permitted holding stake for foreign firms increased from 12.5% to 50%</p> <p>Cites Sanitary and Phyto-Sanitary Concerns</p> <p>Sector requires infant industry protection</p> <p>Sector requires infant industry protection</p> <p>Russia commits to implementing a new legislative framework to deal with IPRs</p> <p>Sector requires infant industry</p>

	sector	protection
	Wants liberalisation of Russia's forestry industry	Environmental Concerns
European Union	Give up the use of its Energy Resources as a Political Weapon (ref: Ukraine issue)	Ukraine issue not politically motivated (Russian Foreign Minister: Sergei Lavrov)
(Peter Mandelson)	Phase out overflight fees for Siberia (EU Transport Commissioner Jacques Barrot) Eliminate dual-pricing of energy supplies between domestic and foreign consumers	EU-Russia deal reached (2004) for gradual elimination of dual pricing structures
Georgia	Russia should give up control and help Georgia regain jurisdiction over the Roki Tunnel (in breakaway South Ossetia), legalise these checkpoints to control flow of contraband goods Russia should give up control and help Georgia regain jurisdiction over Adleri-Leselidze (in breakaway Abkhazia), legalise these checkpoints to control flow of contraband goods Intensify fight against counterfeit Georgian products - mainly Georgian wine and mineral water Allow imports of Georgian wine and spirits through the Zemo Larsi border checkpoint Abandon practice of unilaterally banning Georgian agricultural imports (wines, plants and vegetable products) to Russia Unlicensed and unauthorised operations of MegaFon and Russian banks in Abkhazia	Russia claims that Georgia's demand not Economically Motivated Russia claims that Georgia's demand not Economically Motivated Russia agrees in principle Cites Sanitary and Phyto-Sanitary Concerns
Moldova	Revoke ban against Moldavian wine, meat, meat products and plants (based on veterinary and sanitary standards) - reaction to Moldova's attempt to legalise industry in breakaway Transnistrian region, a largely unrecognised enclave that is recognised by the Russian Federation Officially supports Russia's entry as this would impose welldefined rules between the two nations Wants to impose value-added tax on Russian-supplied natural gas	Cites Sanitary and Phyto-Sanitary Concerns
Ukraine	Wants Russia to revoke ban on Ukrainian dairy and meat imports	Cites Sanitary and Phyto-Sanitary Concerns
Colombia	Wants Russia to cut sugar import duties	Sector requires infant industry

		protection
Australia	Wants Russia to cut sugar import duties	Sector requires infant industry protection

Figure 5

Press Release of EU-Russia Bilateral Agreement

Russia - WTO: EU-Russia deal brings Russia a step closer to WTO membership
IP/04/673 - Brussels, 21 May 2004

EU Trade Commissioner Pascal Lamy and the Russian Economy Development and Trade Minister German Gref have signed today the agreement concluding the bilateral market access negotiations for the accession of the Russian Federation to the WTO, in the presence of the European Commission President Romano Prodi, the President of the Russian Federation Vladimir Putin and the President of the European Council Irish Prime Minister Bertie Ahern.

Romano Prodi, President of the European Commission said: "Today the EU and Russia cement further their trade and economic relations. This deal brings Russia a step closer to the international trade family, the World Trade Organisation, where it belongs."

Key elements of the bilateral deal

The deal concluded today covers the commitments that the Russian Federation will undertake in goods and services once it accedes to the WTO. The average tariff level that Russia will not exceed is 7.6% for industrial goods, 11% for fishery products and for 13% for agricultural goods, in addition to tariff rate quotas for fresh and frozen meat and poultry representing around 600 million euro per year (15% of total EU agricultural exports to Russia).

In services, Russia will be taking commitments in a large range of sectors including telecommunication, transport, financial services, postal and courier, construction, distribution, environmental, news agency, and tourism. Commitments include cross border provision of services and commercial establishment.

In addition, the agreement has solved a range of trade related energy questions, in particular on the question of the domestic price for industrial users of gas. This includes a commitment that the price of gas for industrial users covers costs, profits and investment needed for exploitation of new fields. Russian gas prices to industrial users would be gradually increased from the current \$ 27-28 to between \$37-42 by 2006 and \$49-57 by 2010, which is in line with Russia's own energy strategy. Increasing domestic energy prices will encourage a more efficient use of energy resources in Russia and it is thus mutually supportive of the Kyoto goals.

Finally, agreement was reached to revamp the system of charges currently applied to EU airlines overflying Siberia to make it cost based, transparent and non-discriminatory by 2013 at the latest phase.

WTO accession is likely to anchor Russia into an international rules-based trading system. It will enhance openness, transparency and predictability, which are key to attracting foreign investment and provides a foundation for improved economic governance.

Source: http://ec.europa.eu/comm/external_relations/russia/intro/ip04_673.htm

Figure 6

Conflict Futures Forecast

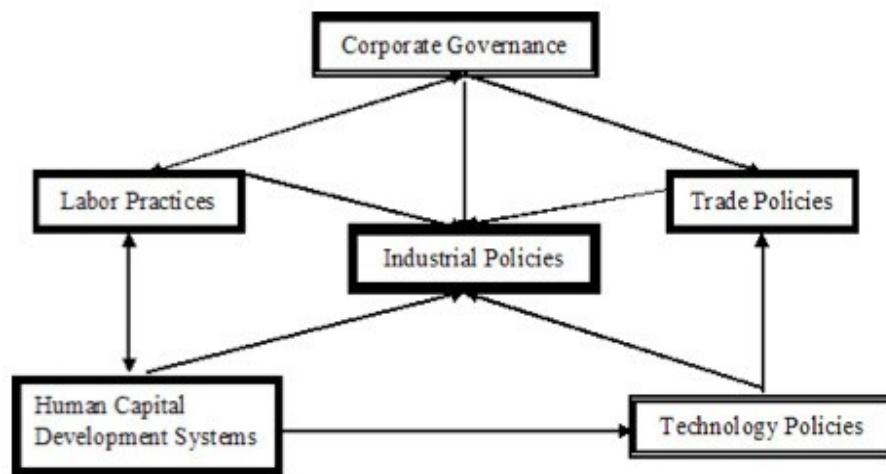
Possible Scenarios Relating to Russia's WTO Accession Negotiations

NO ACCESSION
ACCESSION
NO COMPROMISE
COMPROMISE

1. Total Breakdown of Talks, Russia fails to gain WTO membership	2. Accession is considerably delayed, Russia undertakes major domestic restructuring	3. Russia accedes in 2006/07 but only after giving in to heavy demands	4. Russia accedes in 2006/07, balance between economic concessions and political compromise	5. Russia accedes in 2006/7, without making any significant concessions, neither political nor economic
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Figure 7

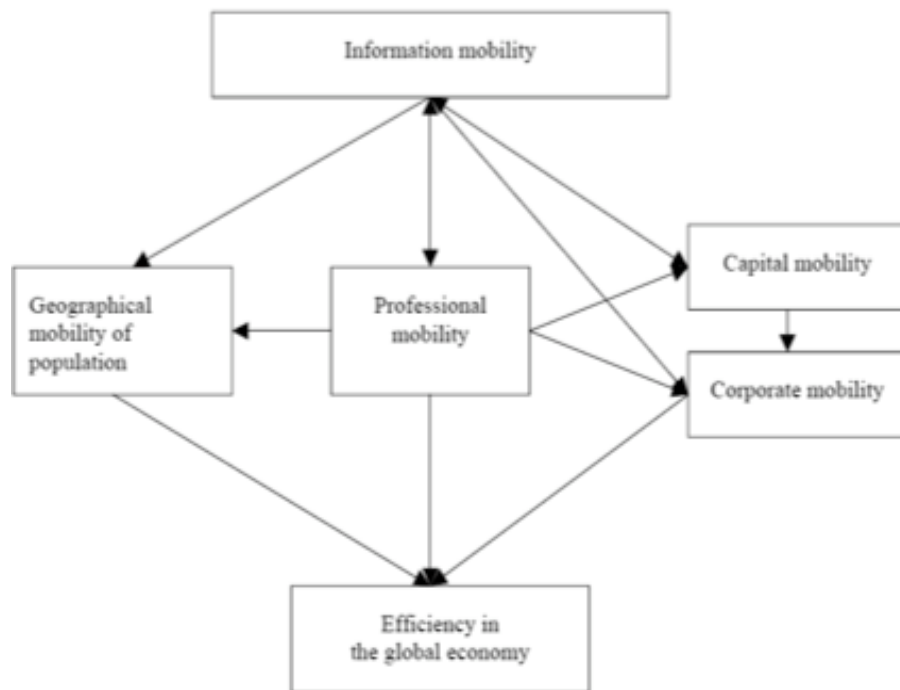
Policy Response for Scenario 2
Developing a National Business System Model?



Source: Rangan, Sinivas, 'Russia and the WTO: A National Business System Perspective', Babson Insight

*Figure 8**Policy Response for Scenario 3*

Shock Absorber: Enhancing different types of labour mobility within Russia?



Source: 'Russia in the WTO: Myths and Reality', Centre for Economic and Financial Research 2001

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NEGOTIATION AS A CORE ISSUE IN POLITICAL CHANGE: THE INTRODUCTION OF THE CPE IN FRANCE AS A CASE STUDY

Matteo Bocci

ABSTRACT

The spring 2006 protests in Paris in response to the Government's introduction of the "Contrat Première Embauche" (CPE) is used as a case study to analyze this policy making shift. The conflict illustrates how different goals and intentions among players, leads to multi-lateral or possibly "pluri-lateral" dynamics.

The CPE case shows that it is not possible to introduce a new policy at a political level if government avoids negotiation with representatives of interested groups. Moreover, it demonstrates the difficulty of policy implementation without prior involvement by the main stakeholder representatives.

Through an analysis of such dynamics and multilateral, as well as pluri-lateral negotiation structures, the conflict is deconstructed and the main positions, benefits and zone of possible agreements are presented. A final overview of possible future scenarios is also provided.

INTRODUCTION

The spring 2006 protests in Paris in response to the government's introduction the "*Contrat Première Embauche*" (CPE) presents an interesting case study for today's policy makers, as it illustrates a possible shift toward multi-stakeholder "negotiations" in policy making rather than a classical central government authoritarian decision. Moreover, it represents and demonstrates how difficult it is to implement a new policy without first involving the main representatives of affected and interested groups. Also, in the specific case of France, it could indicate the difficulty of implementing political change in an institutional setting where interest group representation is not structurally integrated in the policy-making debate and is still perceived as a negative interference in the activities of elected political parties.

Before entering into details of the case dynamics and providing some conclusions and possible future scenarios, as an example we could briefly refer to the role of trade unions in the French public sphere. As universally shown, the penetration and representation of labour unions among affiliates is very limited and is among the lowest in OECD countries¹ in terms of percentage subscription of total employees. As a consequence, unions are continuously seeking confirmation of their role, eventually promoting protest against new policies and adopting the instrument of strikes and demonstrations as a way to gain credibility, rather than to promote social dialogue and participate in societal change. This attitude at best reinforces the negative reputation of unions among government members and the tendency to avoid social dialogue,² and at worst can lead to directly

¹ General evidence is given as slightly more than 9% of total French employed population.

² For example introduce reforms to strengthen the role of Unions among workers.

bypassing any form of consultation of affected and interested parties, as happened with Villepin's strategy to introduce the CPE.

Interestingly, the CPE case shows how at the political level is no longer possible to avoid negotiation with representatives interested groups when seeking to successfully introduce new policies. The dynamics that emerged after the introduction of the new law, considered a "*coup de Gouvernement*" by Prime Minister Dominique de Villepin³, led in fact to an interesting case of political bargaining among different political parties and civil society groups. The conflict presents the diverse goals and intention of the players, each involved in multilateral or possibly "pluri-lateral" dynamics, which we will further analyse. But first we must introduce some facts.

THE CPE: CONCEPT, CONTEXT AND CONSEQUENCES

At the closing the Council of Ministries on 25 February 2006 President Jacques Chirac, as usual in the previous months, asked if any member of the government had anything to add before leaving the meeting. Prime Minister Dominique de Villepin took the opportunity and asked to speak in order to present the "*Contrat Première Embauche*" (CPE) citing it as an "*affaire importante*," requiring solidarity from the entire the governmental "*equipe*."⁴ He claimed that the draft law – which he studied within his team and with little involvement by other members of government and social actors – must be introduced as fast as possible in order to implement the reforms needed to sustain and boost France's economy and employment growth.

In the word of its promoters, the CPE is a new labour law aimed at supporting the entrance of youth and students into the labour market by reforming the "hire & fire" laws for young employees. The CPE is targeted to private companies with more than 20 employees⁵ permitting them to hire youth not older than 26 years and facilitating the ability to fire them before the end of their contract's second year ("*période de consolidation*"), without providing reasons and building dossiers of motivation behind the action. The employee would receive notification 0, 15, or 30 days prior to the their last day of employment, depending on their start date and the time remaining in the *période de consolidation*. In return the government provides the former employee with a monthly subsidy of 490€ during the two months following the firing (if he remained on the job for more than four months), and the employer provides a percentage of indemnity (between 2% and 8% of gross salary). In addition, there some training benefits are provided.

The main ideological force behind the CPE is the assumption that the youth unemployment problem is caused by extreme labour market rigidity – especially the in terms of the difficulty employers have in firing employees. In this sense the new law's approach is similar to the "*Contrat Nouvelle Embauche*" (CNE) introduced for small enterprises in August 2005, with the difference that it is targeted to a specific portion of employed population: young job seekers.

³ Dominique de Villepin was introduced into the political scene by Jacques Chirac in the early 1980s and became one of his advisers on foreign policy. In 1993 he became chief of staff (*directeur de cabinet*) of the Foreign Minister (France Foreign Minister in cabinet), and Chirac's political heir apparent. The 31 May 2005 he became Prime Minister of France, having served in that capacity since then.

⁴ *L'Express*. 02/02/2006, p. 24.

⁵ The distinction between small and medium enterprises in France.

It was this specific targeting that differentiates the CNE from the CPE. The student protests eventually led to a retraction of the proposed CPE. The CNE did not face the same level of protest. The main milestones behind the protest escalation and political conflicts can be summarized as follows⁶:

- *16th of January – Matignon*

Dominique de Villepin announces the CPE at a press conference. Over the previous two days (14th and 15 January) the Prime Minister contacted the key labour union leaders to achieve a minimum level of agreement, without much success.

- *7th of March – Paris*

After various attempts to protest against the CPE, a huge demonstration is promoted involving an estimated 400,000 to 1,000,000 people. The manifestation involves university students and is the first sign of strong opposition to the CPE, as well as the emergence of the student unions as a key player.

- *10th of March – Place de la Sorbonne*

As a consequence of the previous demonstrations, student activists occupy the Sorbonne University. One hundred and fifty students are arrested during the night and in the morning 300 students enter the school and occupy it. The intervention of the police over the next days focuses people's attention on the dynamics and raise sympathy for the students' position.

- *14th of March – Matignon*

The Socialist Party officially enters in the debate, requesting the intervention of French "Conseil Constitutionnel" and of the European Court of Justice, claiming legal irregularities in the CPE both in the substance (discrimination of young workers) and in the process of amendment (lack of parliamentary discussion).

- *15th of March – University de Marne-la-Vallée*

The occupation of universities spreads among the student population and becomes a main instrument of the protest. In Marne-la-Vallée, 800 students are gathered by student unions and occupy the school. Meanwhile, the Socialist Party is divided by internal differences on evaluation of the situation and support to the students' cause.

- *18th of March – Paris*

On the 18th a larger demonstration (referred as the "students' strike") is organised, assembling 80,000 people according to police' reports and 350,000 according to the unions. The strike involved not only university students but also high school students, student family members and members of trade unions and parties to the political left.

- *19th of March – Paris*

A counter demonstration partially against the blockage of the university and partially pro-CPE is organized by other students in front of the City Hall of Paris. The same day negotiations with the Government begin, involving 400 student delegates, many of them officially related to parties on the left.

⁶ *L'Express*. 23/03/2006, p. 34/46.

- *10th of April – Paris*

The CPE is scratched and replaced by some training measures and support to out-of-work or job seeking youth.

THE PLAYERS AND THEIR MAIN GOALS

After the general description provided of the fundamental dynamics and issues at stake in the “pro/anti-CPE” debate, it is necessary to enter into more detail regarding the negotiation process and the strategies and tactics adopted. In order to do so, it is essential to define the different players involved and outline their main objectives.

As always in the analysis of a “classical” negotiation process, the more detail entered the more variety emerges and new sub-actors or local-actors must be taken into account. The result is a set of very complex scenario(s) which can limit the capacity to fully understand the main dynamics. The case of political bargaining currently before us is not an exception. Thus, in order to achieve a better understanding of events, the analysis provided will be limited to the main actors, referred to as “collective actors.”⁷

Five main “collective actors” can be identified:

- a. Government
- b. Students
- c. Political opposition
- d. Trade unions
- e. Employers.

Government

The government itself is a multi-stakeholder player. In fact, in order to understand the internal dynamics vis-à-vis goals and issues at least three main players must be considered: Prime Minister Dominique de Villepin, Interior Minister Nicolas Sarkozy, and President Jacques Chirac. (In an effort to simplify the analysis and obtain a more comprehensible representation of the events, the level of detail brought by an analysis of various government branches and political party positions will be set aside.)

The main goals shared by these actors are:

1. Emerge as the leader of a government team in order to appear as an “active decision-maker”
2. Achieve results in favour of a potential electorate – employers who ask for more flexibility in “hire & fire” rules, and youth who seek jobs and effective employment policies
3. Actively start the campaign for next year presidential elections.

Goals 1 and 2 are strongly correlated, as no leadership position can be achieved in absence of positive results perceived by the electorate, and they both are instrumental to Goal 3, which is the main political objective of the government. Strategies to achieve such

⁷ A representation of the discussed negotiation process among all actors, including group composition and pressures faced is provided in figure 4 as reported in the annex.

a goal by each of the three more relevant players in the government are quite different, the overall goals can be assumed to be very similar.

Students

Among the students a few main groups of internal actors can be identified and classified as anti-CPE, pro-CPE and anti-*blocage*⁸ groups. While the second and third groups are in contrast with the first, the third is not necessary pro or anti CPE, being mainly concerned with the long suspension of studies due to the student strikes. The anti-CPE group was the most visible and the one who emerged strongest in the media.⁹ Yet, it cannot be said that the other two are misrepresentative of the student population.

Overall, the common goals for students groups are:

1. Raise their voice and emerge in the political debate
2. Obtain new members and establish a leadership among students
3. Contribute to the failure of the government policy (and eventually to the failure of government re-election in 2007).

In this case, Goals 1 and 2 could be considered priorities and Goal 3 could be seen as secondary, and possibly a means to achieve the first two priorities. In the negotiation process students have nothing to lose with the exception of grades and school courses. This could eventually create tension among internally amongst the groups (anti-CPE and anti-*blocage*).

Political opposition

The political opposition is quite a complex group. While it involves many political parties, to simplify matters, focusing on the Socialist Party (PS) is sufficient. Other parties were peripherally involved and inevitably took positions on the matter, but only the PS emerged as a key player in the bargaining process – at least at the official level and with respect to the student protests.

In general, the position of the political opposition was a combination of “out-of-power” politicians and students, as it tried to:

1. Emerge as a leader of an anti-government protest and profit from the political debate or at least avoid marginalisation (keeping an eye on the 2007 elections).
2. Achieve results in favour of a potential electorate – youth who are concerned about employment and seek employment policies, and their families who perceived the new policy as unfair.
3. Attract new party members among students.

All objectives were strictly correlated, even though internal debates for different opposition parties emerged in terms of priorities vis-à-vis which segments of the electorate

⁸ All of these players' actions are a result of “sub-negotiation” processes among different subjects. For example, in the anti-CPE area we should keep in mind that various official student unions exist and that other internal pressure groups or “free riders” could be relevant to define the official position in the negotiation process.

⁹ Analysis on media coverage reports a strong disadvantage for pro-CPE and anti-*blocage* groups. Such groups, in fact, were mentioned far less than anti-CPE ones.

to support (e.g. students, families, employers, etc.). In this sense “moderate” parties such as the PS, with a diversified base, suffered more from the struggle than radicals ones.

Labour Unions

Unions were involved in the negotiation process from the outset, even though they chose a marginal position and probably did not have much negotiation power. Different labour unions participated in the bargaining process at different levels.

Their main objectives could be summarized as follows:

1. Benefit from the situation to demonstrate their ability to mobilize people.
2. Extend their influence to students through their “partner” Student Unions.
3. Achieve bargaining power with government for general labour-oriented issues.

As discussed in the introduction “unionization” in France, expressed as a percentage of the labour force subscribing to unions, is very low.¹⁰ Therefore, although Labour Union Goals 1 and 2 could be seen as functional in order to achieve Goal 3, they are indeed relevant for the players as they can guarantee the self-perpetuation of trade unions, meaning the continuing of their existence.

Employers

The official French association of enterprises did not express any official position regarding the CPE law. To quote the association’s President, “*MEDEF s’inquiète du risque de voir le contrat première embauche parasiter le contrat nouvelles embauches, réservé aux entreprises de moins de 20 salariés (TPE)*.”¹¹

Generally speaking the objectives of MEDEF in the dispute are:

1. Avoid the possible negative impact on other, more general labour reforms.
2. Benefit from possible evolution without being compromised.

The employers also acted individually, mainly discussing with the government and specifically the Prime Minister, creating different internal dynamics, possible conflicts and “internal” bargaining activities. The main goal however was to focus on more relevant labour reforms for SMEs and other types of enterprises.

TYPES OF NEGOTIATIONS ADOPTED

We enter now in the analysis of the negotiations’ dynamics, aware that the literature defines different typologies of negotiations based on the numbers and roles of active players involved in the process. “*Bilateral negotiations* are certainly the commonest forms [...], but they are only the simplest type. [...] When more than two parties are present, we speak of *multilateral negotiation*; a sub-variety is *plurilateral negotiation*, when a minority of members of a multilateral body agree to a deal which they hope will be accepted by the rest

¹⁰ General evidence is given as slightly more than 9% of total French employed population.

¹¹ From a press conference held on February the 7th by Medef President Laurence Parisot (www.medefparis.fr/cpe_parisot.php).

of members at a larger scale (or “multilateralized” later on) [...]. An even more complex form is found in *multi-institutional negotiations*, when not only are several different parties involved, but the negotiations take place in a number of rounds at a number of different locations.”¹²

The bargaining process on CPE involved different players with different objectives and goals, often leading to potential conflicts. The surfacing of these potential conflicts of course is dependent on the negotiation strategies adopted, as will be discussed further on, but first the different types of negotiation that emerged require examination.

It is interesting to note how the bargaining process among parties evolved through different negotiation typologies and how, in absence of a structured or official routine, the discussions and mediations happened at different levels. In a classic “consensus reaching” process the political bargaining would have adopted a *multilateral approach*, with the government somehow acting to balance involved parties and promoting the policy which it retained to be the most efficient. Interestingly, the whole debate appeared to be mainly a *bilateral negotiation* among government and students, eventually leading to some minor *pluri-lateral bargaining* among government and Labour Unions on one side and government and enterprises on the other, and evolving at the very end into a sort of *multi-institutional negotiation*, where a number of negotiations taken at different levels convinced the government to retire its proposal and give up its campaign to promote the CPE.¹³

Such an escalation of negotiation typologies is a possible symptom of a general approach, based more on *tactics* than *strategies*.

DESCRIPTION OF NEGOTIATION STRATEGIES AND TACTICS

“Negotiation often means distribution [...], positions are diametrically opposed and in competition one with another. In this situation we tend to speak of winner and loser, although [...] partners might prefer to obtain an agreement, even if unbalanced, than to be without one at all. [In fact] in an ideal world each of them will get what is important to him, so that a good conclusion to a negotiation means that ultimately [all] sides win.”¹⁴

In order to achieve such a “win-win” results, involved parties can move from a “merely” *distributive bargaining* to a more complex and sophisticated process of *integrative bargaining*, where parties introduce “new issues that can be negotiated as a package [and which] are not generally on the table [...] at the beginning, but they have first to be created or brought in with intention.”¹⁵ This means that parties involved can benefit from their ability to “put on the table” different issues to achieve a final mediation among various interests and avoid conflict arising from a “zero sum game” approach, where the gain of one subject is the loss of the other.

Of course, in a multi-stakeholder negotiation the capacity to create new “room for manoeuvre” is even more complex and offers greater benefit for involved parties. The capacity to promote mediation among conflictual positions through the introduction of new possibilities for bargaining giving and taking, is therefore essential in this case.

¹² R. Saner, *The Expert Negotiator*, Martinus Nijhoff Publishers, 2005, p. 211-212.

¹³ It must be said that such “tactical” approach is often more frequent (and somehow inevitable) in political debates than the *multilateral approach* that we introduced as “classic”.

¹⁴ R. Saner. *The Expert Negotiator*. p. 41.

¹⁵ Ibid, p. 82.

The different strategic approaches that can emerge are usually defined in terms of:

- *Competition*, seen as “to push hard to get what we want, [...] to put through our aims exclusively, without heed to the other[s].”¹⁶ In this case “[...] the inevitable result is confrontation, a battle of wills. One of [the involved parties] must give way or be bettered in the final showdown.”¹⁷
- *Collaboration*, an “[...] attempt to find a solution in tandem with the other[s], that takes full account of the desires and interests of [all] parties. [...] It corresponds to *integrative bargaining*.”¹⁸
- *Compromise*, “[...] when each party meets the other half way. Something is demanded but is not absolute.”¹⁹
- *Avoidance*, where “[...] instead of insisting on his demands or cooperating, the negotiator withdraws from the conflict and forgoes an agreement.”²⁰

The players involved in the CPE debate defined different strategies to approach the negotiation process, which probably were the result of a lack of a broad vision and at the very end were finalized to maximise particular interests through an overall absence of compromise and collaboration. Let’s analyse each player’s strategy, reintroducing the main goals for each key group.

Government

The Government could develop a variety of possible strategies in order to achieve its goals, including:

1. Leadership
2. Results
3. Political campaign

Goals 1 and 2 could have made room for *integrative bargaining* with other players, especially students and employers. Nonetheless, the perceived relevance of Goal 1 in order to achieve “goal 3” redirected the approach to *distributive bargaining* (“no alternatives”) with students, unions and political opposition. As de Villepin stated: “*Le danger c’est l’incompréhension. Il n’y a pas de vice caché dans ce que nous proposons.*”²¹ This to say, the CPE is a good reform and it must be implemented, it just needed to be fully explained to achieve consensus. More room for *integrative bargaining* rested with employers, though, as proved by the of 20 March meeting with key French employers seeking to understand whether the introduction of the CPE was the only way to satisfy employers, thereby securing their political support.

To sum-up the approach:

¹⁶ Ibid, p. 107.

¹⁷ Ibid, p. 108.

¹⁸ Ibid, p. 108.

¹⁹ Ibid, p. 109.

²⁰ Ibid, p. 109.

²¹ *L’Express*, 23/03/2006, p. 34.; De Villepin represents opposition to the right of the French government considered right-middle on the political spectrum.

- *Competition with students*: no compromise and collaboration, but at least an attempt to explain the benefits of the reform
- *Collaboration with employers* and possible integrative bargaining with other reforms
- *Compromise* (although publicly it was competition) with Unions to mutually benefit from each political position (this strategy is not so evident, but could be put as an hypothesis due to constant opinion exchange among the parties at an informal level).

Students

The main goals of the anti-CPE organization of students can be summarized as follows:

1. Celebrity
2. Membership
3. Anti-Government

In order to achieve these aims, there was no other way than to enroll in a “zero-sum game” (*distributive*) bargaining with the government. This leaves no possibility to define priorities among their goals and therefore no possibility of *integrative bargaining* – not with government nor with the government’s political opposition. This is despite the fact that goals 1 and 2 suggest that conflicts or lack of collaboration with political counterparts could have emerged.

Conflict was therefore the main strategy (though avoidance was adopted with unions and the government’s political opponents, especially in the later phase of the conflict). Definitely no “package of negotiation” was introduced to promote a “constructive dialogue” and the only focus was the abolition of CPE.

Political Opposition and Trade Unions

The main aim of these players was to stop the government’s plan and benefit from the situation. Key political party objectives were to enlist new members among students and reinforce their role in the eyes of the electorate. Meanwhile, unions were concerned with appearing capable of mobilizing people.

Therefore, although the stated position was conflictual and anti-government, the real aim was to benefit from student movement and somehow avoid real confrontation with the government (probably due to a lack of concrete alternatives to promote and the fear of a potential decline in public consensus). The main approach was therefore a tactical one, evaluating contingencies to maximize benefits and reduce possible drawbacks.

Employers

Possibly employers were even more reluctant to take a strong position in the negotiation, due to their lack of interest in the CPE given their aim for more general labour reforms.

The position was therefore to avoid conflict, eventually benefit from the CPE introduction or bargain the abolition of the law with the promotion of other reforms. Even for employer organizations the approach was tactical, and a reduction of risk was the main strategy.

ANALYSIS OF THE ZONE OF POSSIBLE AGREEMENT²²

To understand the possibility of reaching a consensual deal among negotiating parties it is necessary to assess the existence of the “range of issues on which in principle an agreement is possible. [In literature] this range is known as the ‘zone of possible agreement.’”²³

In the case of the CPE, the main negotiation involved government and students in a distributive process where one wanted to introduce the reforms and the other to abolish it. Given the diametric opposition of these goals, no “zone of possible agreement” (ZOPA) emerged. Also the desire to avoid confrontation with social partners led the government to a difficult *impasse*, as labour unions and employer organizations did not support the government or at least act to mediate in the conflict dynamics.

The classical assertion of Von Clausewitz states, “conflict resolution may be replaced by either avoidance of conflict (the irreconcilable parties each go their ways) or open war.”²⁴ In the case of the CPE both approaches emerged: left oriented groups (mainly political parties but also some unions) as well as employer organizations tried to avoid conflicts, while government and students opted for an open war!

In the end, the government failed to achieve support from potential political partners (e.g., employer organizations) as well as other interest groups (e.g., trade unions) and ran alone against a “popular insurrection” (the students). Overall, the entire governmental strategy was a failure. It did not provide any possibility for *integrative bargaining* at any stage. Rather, it promoted a *distributive negotiation* in a potentially very hostile context. It is no surprise that in such a negotiation-set students were the most powerful players – they were the only ones who could endure the fight with without suffering potentially severe consequences. Their political counterparts, plus the labour unions’ and employers’ organizations could then benefit from the students’ approach and possibly achieve political results without much exposure to risk.

ILLUSTRATION OF POSSIBLE FUTURE SCENARIOS

In order to define future scenarios two different approaches (and methodologies) can be adopted:

- A methodology aimed at imagining possible worlds redefining our categories of living,²⁵ which describes possibility spaces in the present and in the future in order to design strategies to achieve possible future worlds;
- A methodology aimed at defining possible consequences of conflicts and political *impasses*,²⁶ which outlines two main future trends in order to describe possible evolutions of current conflicts.

The second methodology seems more appropriate and therefore two main future trends can be identified. In order to do this, reference is made to the current decision by Dominique de Villepin to implement the “*Commission Université-Emploi*” established to investigate possible policies targeting youth unemployment. As reported on the government’s website, the Commission aims to involve “*des représentants du Conseil*

²² Saner, R. *The Expert Negotiator*. Martinus Nijhoff Publishers, 2005, p. 42.

²³ Ibid.

²⁴ Ibid. p. 43

²⁵ Mainly adopted by OECD and research centres involved in strategic studies.

²⁶ Used by Harvard fellows and usually taught at the Harvard’s Kennedy School of Government.

économique et social, des responsables universitaires et des syndicats étaient également présents."²⁷ It seems a step toward collaboration among involved parties and could be a good move by the government. (see *schema 3*)

To evaluate possible scenarios we therefore identify the two main trends as:

- Capacity to negotiate – collaboration with students
- Capacity to negotiate – collaboration with Unions and enterprises organizations.

1st scenario: compromises by students and compromises by unions/enterprises

This is the best scenario. It will require the capacity of the government to open the discussion in very constructive ways: defining a wide ZOPA; possibly adopting some resolutions developed by all parties involved; implementing a collaborative and integrative bargaining process. Of course in order to achieve such a result the government should accept a partial redefinition of its goals and its political options. Needless to say such a scenario would be revolutionary and even a partial achievement could be considered a government success, especially since it would marginalize the opposition.

2nd scenario: no compromises by students and no compromises by Unions/enterprises

This is a worst-case scenario, though it is quite unlikely to happen as some concessions could emerge from enterprise. Nonetheless, the recent defeat of the government has proven its fragility, and could in turn have strengthened the unwillingness to negotiate by all involved parties. In this case, the political opposition could continue to oppose the game to contest the government without promoting concrete ideas to solve the problem at stake (youth unemployment). This scenario would lead to the definitive fall of the Prime Minister, whose political credibility is already rather low.

3rd scenario: no compromises by students and compromises by unions/enterprises

This scenario could be possible and not negative *per se* – neither for the government nor for other players. Students may continue to resist compromise, but consensus can be found with unions and employers, and in the end a structural reform could be pursued, eventually limiting the destructive impact of student reactions. Of course, the political opposition could exploit the students and promote new strikes. This, in the end, could convince the Unions to give up the collaboration and obstruct the new policies.

4th scenario: compromises by students and no compromises by unions/enterprises

This scenario may be at once a great victory for the government, and at the same time the ultimate loss. Is a victory because being able to achieve compromises by students alone demonstrates an unusual capacity to learn by previous mistakes. It represents a loss because avoiding the support of unions and employers to obtain support from the students could eventually lead to political suicide and will leave a large room of manoeuvre for the political opposition.

²⁷ http://www.premier-ministre.gouv.fr/information/actualites_20/installation-commission-debat-national_55804.html.

CONCLUSIONS

This paper offered an analysis of the introduction of a new labour law (CPE) in France as a form of political negotiation. The case analysis was a means to introduce a more general trend in today's political action of policy making as political negotiation among affected parties.

In the analysis what emerged was that political action either requires the ability to force unwilling parties to accept government resolutions (also known as dictatorship) or the capacity to achieve compromises and create integrative bargaining processes where most of the involved parties can achieve some benefit. Unfortunately thus far, in the debate on the CPE and youth unemployment, no party has demonstrated such capacity. This may possibly be due to the absence of long-term strategies, and is surely due to the inability to start negotiating in a broader sense – integrating different possible goals to obtain a minimum field for possible agreement, and exiting from an *impasse* which now seems unsolvable.

ANNEXES

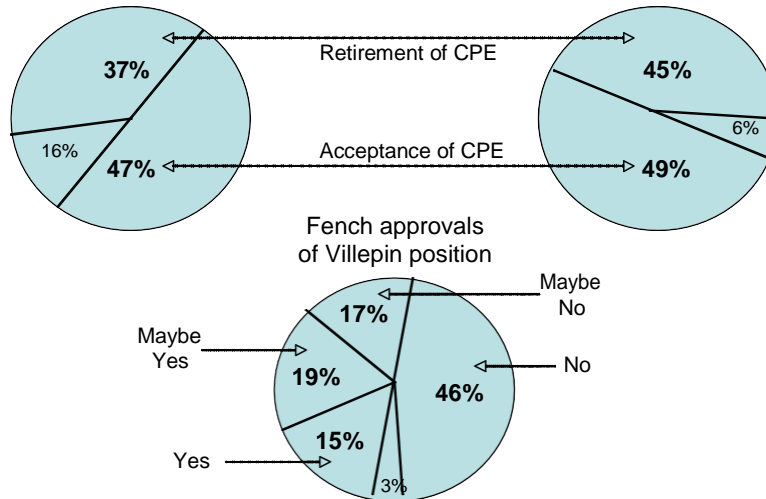
1- Parliamentary positions

	Average	Left parties	Right parties
No modifies	4%	-	8%
Modifies	50%	35%	72%
Abolish	44%	64%	16%
No position	2%	1%	4%

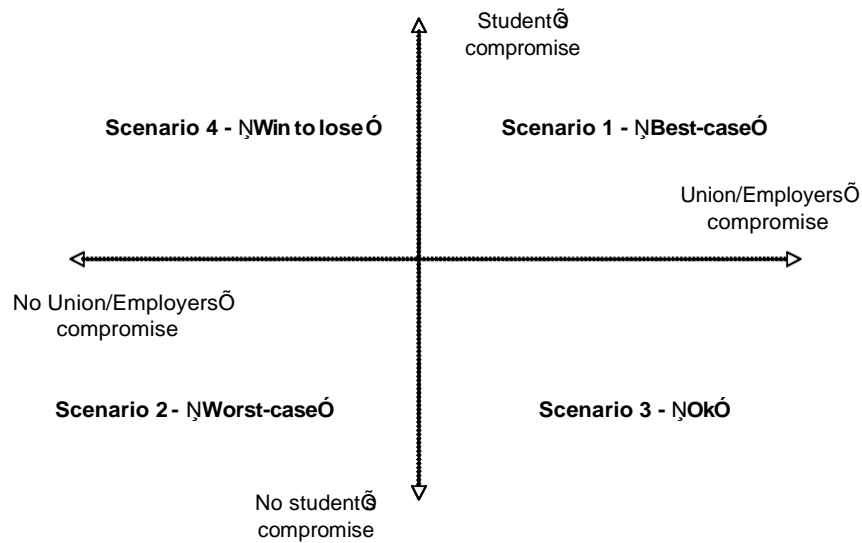
2- Expectation on crisis's evolution

Average of French expectations

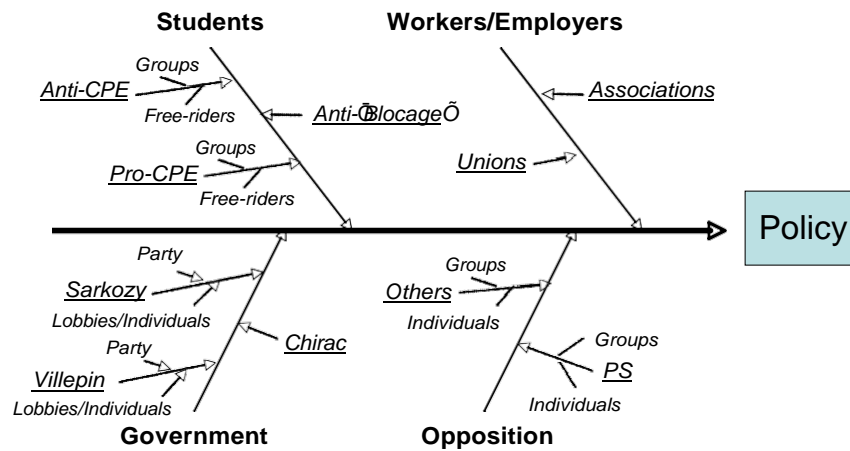
Expectation of people younger than 26



3- Possible future scenarios



4- Diagram of actors and interaction dynamics



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THE UKRAINE-RUSSIA ENERGY DISPUTE: WITH FRIENDS LIKE THESE WHO NEEDS ENEMIES?

Margaret Galbraith

ABSTRACT

“Russia is important to world energy markets because it holds the world's largest natural gas reserves, the second largest coal reserves, and the eighth largest oil reserves. Russia is also the world's largest exporter of natural gas, the second largest oil exporter, and the third largest energy consumer.” This quote from the US government's Energy Information Administration underscores Russia's importance as a supplier of the world's energy needs. The current dispute between Russia and Ukraine over the prices and transmission of natural gas has not simply impacted these two countries. This conflict has served as a wake-up call to the rest of Europe, reminding them not only of the importance of Russia, but of their own dependencies on its natural gas exports. This chapter seeks to examine the nature of the continuing conflict, analyze the actors involved and their stakes and ultimately propose several likely outcomes.

INTRODUCTION

“Russia is important to world energy markets because it holds the world's largest natural gas reserves, the second largest coal reserves, and the eighth largest oil reserves. Russia is also the world's largest exporter of natural gas, the second largest oil exporter, and the third largest energy consumer.”¹ This quote from the US government's Energy Information Administration underscores the importance of Russia as a supplier of the world's energy needs. The current dispute between Russia and Ukraine over the prices and transmission of natural gas has not only impacted these two countries. In fact, this conflict has served as a wake-up call to the rest of Europe, reminding them not only of the importance of Russia, but of their own dependencies on its natural gas exports. The conflict came to a climax in December 2005 when Russia issued an ultimatum to Ukraine stating that as of 1 January 2006, they must pay ‘market value’ for the gas purchased from Russia. In this instance, ‘market value’ was equivalent to an immediate price increase of over 400% of the value established in the current contractual agreement between the two nations. When Ukraine refused to pay, Russia cut off its gas supply. This unilateral action by Russia also impacted Western Europe as most of the gas bound for the region travels through Ukrainian pipelines.

This chapter seeks to examine the nature of the conflict, analyze the actors involved and their stakes and ultimately propose several likely outcomes. It evolves as a three-fold situation analysis. First, the different regional transit routes (pipelines) involved will be shown. This is important, particularly for understanding the geo-strategic and logistical aspects of the conflict. Second, a close look will be taken at the actors. Special attention

¹ Country Background: Russia, Energy Information Administration, Official Energy Statistics from the US Government, available online at: <http://www.eia.doe.gov/emeu/cabs/Russia/Background.html>

will be given to key actors, such as Russia and Ukraine; but other parties will be examined as necessary. In each case, the issue is identified, as are the stakes and the room available for negotiation, recognizing that this may not always be possible. Finally, the first two pieces are pulled together to outline the conflict more concretely. By highlighting the infrastructure and the actors at the beginning, the aim is to clarify the global-scale nature of this conflict.

THE PIPELINES

How Large a Supply is this?

During the Soviet era, beginning in the 1940s, Russia exported natural gas on a very small scale to its satellite countries, Poland for example. Although Russia continues to export gas to Poland, it is no longer a main customer. Over the past years, Russia has increasingly exported to Western Europe, helping these countries maintain the supply they require. Originally, the notion of exporting gas all the way to Western Europe was a daunting if not impossible task. While the market appeared to be moving west, the resources were moving east from the Urals and Caucasus to Siberia. Hence, the energy would need to be transported thousands of kilometers to its final destination. Subsequent development of the industry within the Soviet Union, together with the discovery of very large natural gas fields in the 1970s and 1980s, resulted in the development of a “large-diameter” pipeline extending from Siberia to Ukraine. This allowed gas to eventually be transported farther west. “Between 1970 and 1980 deliveries of Soviet gas to Western Europe increased from 3.4 billion cubic meters (bcm) to 26 bcm. By 1990 gas exports had risen to 109 bcm and Western Europe, with 63 bcm of imports, was the largest customer for Soviet gas.²” Within 30 years, the amount of gas exported from Russia increased twenty fold, and the number of “client” countries more than quadrupled. At the same time, due to the nature of transit by pipeline, Russia had to negotiate numerous agreements to facilitate the transport of their product, which in some respects has diminished their overall control.

The Path of the Pipelines^{3,4}

The main pipelines outlined below are key to the stakes of many of the players in this conflict. It is important to note that some of the lines mentioned are not yet operational.

Blue Stream Pipeline

Turned on in 2002, this pipeline not only transports Russian gas to Turkey, but it crosses the Black Sea at record depths – greater than 2000 meters. This pipeline is intended to serve as an alternative route to Europe, thus bypassing Ukraine, Moldova and Belarus. “By 2010,

² Stern, Jonathan, Director of Gas Research, Oxford Institute for Energy Studies, “Natural Gas in Europe – The Importance of Russia”, Available online at: http://centrex.com/de/files/study_stern_e.pdf

³ Alexander’s Gas and Oil Connections – North Central Europe available online: <http://www.gasandoil.com/goc/news/nte32320.htm>

⁴ Stern, Jonathan, Director of Gas Research, Oxford Institute for Energy Studies, “Natural Gas in Europe – The Importance of Russia”, Available online at: http://centrex.com/de/files/study_stern_e.pdf

Blue Stream is expected to be operating at full capacity, delivering 16 billion cubic meters of gas per year. Total length of the pipe is 1213 km.”⁵

Brotherhood and Soyuz

These pipelines both pass through Ukraine on their way to Western Europe. Each has the ability to transmit approximately 1 tcf/year.

North European Pipeline

This pipeline, currently under construction, will bring gas from northwest Russia through the Baltic Sea, to Germany and possibly to the UK, Sweden and Denmark. This pipeline concerns Poland as it feels the pipeline will allow Russia to limit access by their former ‘satellites’ to natural gas.

Trans-Balkan

This pipeline runs from Russia to Ukraine and Bulgaria and is responsible for transporting most of the imports for Southeastern Europe. The pipeline has a capacity of 18-20bcm/year.

Yamal-Europe Pipeline

This natural gas pipeline, which supplies gas to Germany, is Russia’s only pipeline that does not pass through Ukraine. Instead, it passes through Belarus and Poland. The capacity is estimated at 1.1 tcf/year.

Yamal II

This pipeline is currently still in the planning stages. If construction begins, it will more than double the current capacity provided only by Yamal-Europe to 2.3 tcf/year.

ACTORS

Russia

Issue

Russia is the world’s number one supplier of natural gas and the number two oil resource. For years, Russia has provided Europe with natural gas. This gas has traveled through Ukraine to its destinations in Italy, Germany, France and the UK for example. Russia has made it a practice to provide gas at prices significantly below market value to those countries perceived to be in within its sphere of influence, such as Ukraine. In 2004, as a political move, Russia renewed a contract permitting Ukraine to purchase gas for \$50/bcm. Although claimed as normal practice, it is widely considered that this was a political move on the part of Vladimir Putin in order to influence the outcome of that year’s Ukrainian presidential election. It was no secret that then President Leonid Kuchma and candidate Viktor Yanukovich were both favorable to the Kremlin and strongly desired to not only keep Ukraine within Russia’s influence, but to strengthen the ties between the two nations.

⁵ Wikipedia contributors, "Blue Stream," Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/w/index.php?title=Blue_Stream&oldid=52805503 (accessed May 15, 2006).

At the same time, it was quite clear that the other candidate, Viktor Yushchenko, was running on a platform seeking bring Ukraine closer to the European Union.

At stake

Being the world's largest supplier of natural gas is one thing, but it is meaningless without delivery capacity. The key problem for Russia is that it is dependant on the pipeline running through Ukraine to deliver gas not only to Ukraine, but also to most of Europe. Though they are developing alternative transit routes, given the projections for energy consumption in the future, it is unlikely that Russia will be able to completely avoid passage of its natural gas through Ukraine.

There is also a politico-economic angle to consider. Russia recognizes its ability to reclaim its status as a world power – through energy. The country is rebuilding its economy based on energy and trying to flex its political muscle and concern for energy security through its current leadership of the G8. Additionally, over the past 35 years, Russia has had an outstanding record for delivery – a reputation they seek to preserve.⁶

Room for negotiation

Although there are other pipelines (either currently operational or under construction), the capacity is not there to facilitate the transfer of the amounts demanded. Therefore, Russia needs a negotiated settlement. Additionally, there is a political aspect to consider – Russia's accession to the WTO. This problem, is ultimately a trade issue, therefore it is important to demonstrate to the world that they can 'play within the rules' while at the same time displaying some of their strength. It is a delicate balance.

Ukraine

Issue

As stated previously, Ukraine had for some time enjoyed extraordinarily inexpensive natural gas prices from Russia. Following the events of the 'Orange Revolution' and the election of Viktor Yushchenko as president, this changed. At the end of 2005, Russia decided that Ukraine should pay market value for the gas it was receiving. In return, Ukraine demanded market value for the use of its pipeline infrastructure. It is from here that the conflict escalated.

At stake

Ukraine is greatly depends on Russian gas, as much of its infrastructure and heavy industry is antiquated and inefficient. Additionally, it is heavily industrialized with insufficient natural gas resources and a lack of modern technology and financial backing to explore alternative energy sources. "About a third of Ukraine's gas is supplied by Russia, while Ukraine produces about 20 percent of its own needs. The remainder comes from former Soviet Turkmenistan, via Russian Pipelines...Gazprom reportedly cut off Ukraine supplies

⁶ Stern, Jonathan, Director of Gas Research, Oxford Institute for Energy Studies, "Natural Gas in Europe – The Importance of Russia", Available online at: http://centrex.com/de/files/study_stern_e.pdf

from Turkmenistan, too.”⁷ At the same time, the pipeline running through Ukraine connects Russia with the rest of Europe. At stake here for Ukraine, is its ability to continue to obtain natural gas from Russia. Potentially however, the stakes are even bigger, extending to economic sustainability and potentially their sovereignty and continued independence from Moscow.

Room for negotiation

As long as Russia needs access to Ukraine’s pipeline infrastructure to transport Russian natural gas to the west, Ukraine has excellent leverage.

Ukraine has additional negotiating power, aside from owning the pipelines that Russia needs. Following the breakup of the Soviet Union, Ukraine retained control of the Crimea and thus the port town of Sevastopol, home of the Black Sea Fleet. Ukraine was given the region as a gift from Nikita Khrushchev. Currently, they lease the port to Russia at a price below market value. “The continuing use of this base, more than a decade after the collapse of the Soviet Union, is a permanent irritant in the relations between Russia and Ukraine, despite the signing of an agreement dividing the Fleet between two countries in 1997.”⁸

European Union

Issue

On a global level, it is alarming how dependant the European Union has become on natural gas imported from Russia. This cause for alarm is not because the gas is coming from Russia specifically, but rather because it underscores the lack of diversification. As energy consumption continues to increase this factor becomes more and more important. After all, it is better to spread your resources – even if it means putting some in less stable areas – rather than keeping them all in one location.

At stake

The key issue for the European Union is its continued supply of natural gas. To this end, Europe has forged an energy partnership with Russia. “With the passing of the Cold War and the increasing need for Europe to develop strong relationships with its energy suppliers, the European Commission proposed an “energy dialogue” with Russia.”⁹ Currently 80% of the Russian natural gas Europe imports travels through Ukrainian pipelines.¹⁰ EU member

⁷ Weir, Fred “Russia-Ukraine Gas Standoff”, *The Christian Scientist Monitor*, 03 Jan, 2006 available online at: <http://www.csmonitor.com/2006/0103/p01s04-woeu.html>

⁸ Wikipedia contributors, “Black Sea Fleet,” Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/w/index.php?title=Black_Sea_Fleet&oldid=46021501 (accessed May 15, 2006).

⁹ Stern, Jonathan, Director of Gas Research, Oxford Institute for Energy Studies, “Natural Gas in Europe – The Importance of Russia.” Available online at: http://centrex.com/de/files/study_stern_e.pdf

¹⁰ Weir, Fred “Russia-Ukraine Gas Standoff”, *The Christian Scientist Monitor*, 03 Jan, 2006 available online at: <http://www.csmonitor.com/2006/0103/p01s04-woeu.html>

states Slovakia and Finland are both completely dependent on Russian natural gas that transit through Ukraine. Other countries, such as Poland and Hungary are 90% dependant.¹¹

Implications for individual member states

Poland

Poland imports 61% of its natural gas needs from Russia. Additionally, the construction of the North European Pipeline ruins Poland's leverage as a transit country. As with Ukraine, in October Russia announced it was considering a natural gas price increase for Poland. Again, much like with Ukraine, Poland already had an agreement in place. The agreement, signed in 1996, stated that Gazprom agreed to provide 167bcm to Poland until 2022. Poland's Economy Ministry remained uncertain as to whether the price was currently negotiable.¹²

Slovakia

The natural gas that transits Slovakia represents about 25% of the natural gas consumed in Western Europe and about 70% of the Russian natural gas exported to Western Europe.¹³

Germany

Germany is poised to become a transit route with the completion of the North European Pipeline.

Hungary

The Magyars reported a decrease in their imports by more than 40% after the gas shut off on 1 January 2006.

Romania, Croatia, Slovakia and Austria

All reported a decrease of around 30% after Russia shut off the flow.¹⁴

Room for Negotiation

The result of the crisis was the realization that the E.U. lacked a coherent and strategic energy policy. They found themselves during an extremely cold winter facing the prospect of not having the energy necessary to supply heating to their citizens.

Without diversification of its natural gas portfolio, Europe is taking a very large risk. It is, therefore in its best interest to create policies that facilitate and mandate supply diversification as well as promote research into alternative access to natural gas and alternative energy sources. One suggestion is for Europe to collaborate with the countries of

¹¹ Chichester, Giles "Energie : la crise du gaz Russie-Ukraine, un avertissement pour l'Union européenne" President of the European Parliament's Commission on Energy, Research and Industry available online at: <http://www.fenetreurope.com/php/page.php?section=actu&id=5120>

¹² Dempsey, Judy, "Poland intends to cut reliance on Russian gas" Alexander's Gas and Oil Connections, Company News: Europe, 18 Nov 2005, Available online at: <http://www.gasandoil.com/goc/company/cne54914.htm>

¹³ Alexander's Gas and Oil Connections – North Central Europe available online: <http://www.gasandoil.com/goc/news/nte32320.htm>

¹⁴ Weir, Fred "Russia-Ukraine Gas Standoff", *The Christian Scientist Monitor*, 03 Jan, 2006 available online at: <http://www.csmonitor.com/2006/0103/p01s04-woeu.html>

the Caspian region. This solution would require a good deal of collaboration and investment on the part of the EU as one of the current issues blocking access to the reserves in this region is the lack of infrastructure. Additionally, there would need to be agreements coordinated between the different production and transit states. This would be a long-term investment, which would greatly facilitate the diversification of the European energy supply and diminish the need to obtain natural gas through Gazprom.¹⁵

Additionally, the European Commission's "energy dialogue" has facilitated a "high-level channel of communication between Russia and the EU". This dialogue has served as an ongoing negotiation between both sides allowing them to discover each other's differences as well as find projects of common interest, such as:

the North European gas pipeline for which the EU has agreed to co-finance a feasibility study;

the Yamal pipeline;

the Shtokman gas field;

the Druzhba-Adria oil pipeline link.¹⁶

Poland has recently offered a solution aimed at diversifying its energy purchases while also attempting to reduce its dependency on Russian imports. Mainly, the scheme consists of Poland importing natural gas from both Norway and Germany. Unfortunately, this plan is logistically and economically not possible at present, leaving Poland plainly in the hands of Russia and Gazprom.

Caspian Sea Region (Kazakhstan, Uzbekistan, Turkmenistan, Azerbaijan and potentially Iran)

At stake

Although this region is currently constrained due to political and economic turmoil, it has great potential and within the next decade is expected to have a huge impact on the global energy market.¹⁷ As European markets look to diversify their energy purchasing, this area stands to gain a great deal.

Additionally, it appears that both Ukraine and Russia have contracts with Turkmenistan. This is nothing new, as both countries have imported a portion of their natural gas requirement from here for some time. The problem now is that the newer contracts stipulate larger amounts than the region is capable of providing due primarily to infrastructure constraints.

Room for negotiation

Aside from political and economic turmoil, the main roadblock thwarting this region's progression in the energy arena is a lack of adequate infrastructure and disputes over the

¹⁵ Tsereteli, Marmuka, Central Asia - Caucasus Analyst, "The Blue Stream Pipeline And Geopolitics Of Natural Gas In Eurasia." Available online at:

http://www.cacianalyst.org/view_article.php?articleid=3848&SMSESSION=NO

¹⁶ Stern, Jonathan, Director of Gas Research, Oxford Institute for Energy Studies, "Natural Gas in Europe – The Importance of Russia." Available online at:

http://centrex.com/de/files/study_stern_e.pdf

¹⁷ Caspian Sea Regional Analysis Brief, Energy Information Administration, Official Energy Statistics from the US Government, available online at:

<http://www.eia.doe.gov/emeu/cabs/Caspian/Background.html>

path of transit. It is possible that through a multi-lateral negotiation with EU members and regional representatives that perhaps a deal can be struck whereby EU members assist in the creation of the infrastructure in exchange for favorable rates on natural gas. Perhaps, much like how the natural gas export industry in Russia was encouraged by the West during the Cold War, the same will happen here.

Gazprom

Gazprom, Russia's state-controlled energy company is the world's largest producer of natural gas. "Apart from its gas reserves and the world's longest pipeline network with 150,000 km, it also controls assets in banking, insurance, media, construction and agriculture. With US\$ 269 billion of market capitalization, (as of May 2006), Gazprom is the world's 3rd largest corporation, just after Exxon Mobile and General Electric and before Microsoft."¹⁸

"Gas will still constitute 90% of its production next year. One Moscow investment bank calculates that for oil to account for half of its output, Gazprom would have to buy the entire Russian oil industry. Last year, Gazprom produced 20% of the world's gas. It has 60% of Russia's gas reserves and 16% of the world's. If it were a country, its oil and gas reserves combined would rank only behind Saudi Arabia's and Iran's."¹⁹

RosUkrEnergo

"RosUkrEnergo is a Swiss-registered venture company that transports natural gas from Turkmenistan to East European countries. Gazprom owns fifty percent of the company through its Swiss-registered ARosgas Holding A.G. Another fifty percent is owned by Centragas Holding. The shareholders behind the Centragas are not known and rumors link them to different groups: from the Ukrainian Criminals to the Russian politicians."²⁰ It is not known specifically what role this company plays except that, as a subsidiary of Gazprom, it is responsible for transporting gas through Ukrainian territory.

HISTORICAL BACKGROUND

In what may seem like a case of strange bedfellows, "the foundations of Russia's gas export business were laid during the Cold War. The trade was able to develop despite political opposition partly because West European governments believed gas could be a force for peace and partnership and prosperity. The other main reason has been the excellent track record of first Soviet, and then Russian, gas deliveries to Europe over the past 35 years."²¹ Throughout the years since the breakup of the Soviet Union, and particularly under the

¹⁸ Wikipedia contributors, "Gazprom," Wikipedia, The Free Encyclopedia, <http://en.wikipedia.org/w/index.php?title=Gazprom&oldid=52856004> (accessed May 15, 2006).

¹⁹ "Russia's energetic enigma", Oct 6th 2005 | MOSCOW, From The Economist print edition, available online at:

http://www.economist.com/cities/displaystory.cfm?story_id=4484349

²⁰ Wikipedia contributors, "RosUkrEnergo," Wikipedia, The Free Encyclopedia, <http://en.wikipedia.org/w/index.php?title=RosUkrEnergo&oldid=50299500> (accessed May 15, 2006).

²¹ Stern, Jonathan, Director of Gas Research, Oxford Institute for Energy Studies, "Natural Gas in Europe – The Importance of Russia", Available online at: http://centrex.com/de/files/study_stern_e.pdf

presidency of Vladimir Putin, Russia has slowly, and somewhat quietly, become an energy giant, with the state-run monopoly, Gazprom at the head.

Russia, even under the Soviet Regime, has for some time exported discounted natural gas to its satellite countries. This continues today, for those who remain allies of Moscow. Belarus currently pays a mere \$47(tcm) for the same gas that some European Union countries pay \$110(tcm). On average, Gazprom's customers in Western Europe pay \$137(tcm) (it is expected to increase to \$255 in 2006). This is juxtaposed against the contracted fee of \$50(tcm) provisioned under the previously negotiated contract with Ukraine and the current demand for a fee of nearly \$230 (tcm).²²

To complicate matters, the pipeline that carries Russian natural gas through Ukraine also transports natural gas from Turkmenistan, another provider for Ukraine. After Moscow shut off the flow of gas to Ukraine, Ukraine continued to draw gas from the pipeline, stating that it was not Russian gas they were drawing on, but rather the natural gas from Turkmenistan which they had rightfully purchased.

Eventually, a temporary deal was reached. The provisions of the agreement state that, "Ukraine will buy gas from the Swiss-registered trading company RosUkrEnergo, which is half-owned by Gazprom. The overall price Ukraine will pay will be \$95 per 1000cm. It will also get paid 47% more for transporting Russian gas to Europe. Previously, Ukraine bought gas from both Turkmenistan and Russia at a price of \$50 per 1000cm."²³ This agreement stipulates that the fees for the transfer of gas though Ukraine will be renegotiated in 6 years, whereas the fees for the purchase of gas from Russia are valid for 6 months.

The events at the end of 2005 and beginning of 2006 are not just about a company wanting to be paid 'market value' for its product. Rather, it is widely accepted, even by those in Moscow, that the current conflict arises not so much from a profit-seeking company, but because of political motives. "The gas conflict has its roots in Ukraine asserting its independence from Russia a year ago. Moscow says Kiev should follow the logic of the 'Orange Revolution,' in which Ukrainians broke free from Russian influence, and accept that the days of Soviet-era energy subsidies must end."²⁴ It appears evident that the current demand for a 400-fold increase in pricing is nothing more than a retaliatory measure on the part of Russia. It is therefore ironic that this crisis occurred when it did. "The crisis erupted on the same day Russia assumed chairmanship of the Group of Eight (G-8) market-driven democracies, a high-profile position which Moscow has pledged to use to promote global 'energy security.'"²⁵

Throughout this conflict, Russia has used many tactics, not limited to time constraints, precedent, and even blatant threats. These actions have been aimed not only toward Ukraine, but also toward the EU. This is evidenced by statements made by Gazprom's CEO, Alexei Miller. As noted in *The Economist*, Miller "apparently linked a putative thwarting of his company's European expansion with a hint that exports could be redirected, say, to China...This bullying tone seems to be official policy. Indeed, Vladimir

²² Weir, Fred "Russia-Ukraine Gas Standoff", *The Christian Scientist Monitor*, 03 Jan, 2006 available online at: <http://www.csmonitor.com/2006/0103/p01s04-woeu.html>

²³ Ukraine and Russia reach gas deal, BBC News Online

²⁴ Weir, Fred "Russia-Ukraine Gas Standoff", *The Christian Scientist Monitor*, 03 Jan, 2006 available online at: <http://www.csmonitor.com/2006/0103/p01s04-woeu.html>

²⁵ Weir, Fred "Russia-Ukraine Gas Standoff", *The Christian Scientist Monitor*, 03 Jan, 2006 available online at: <http://www.csmonitor.com/2006/0103/p01s04-woeu.html>

Putin, Russia's president, repeated the treat on April 26th, when he spoke of 'unfair competition in world markets.'"²⁶

RESOLUTION PATHS

"Ukraine and Russia must continue negotiations in order to achieve a mutually acceptable solution on the gas issue, which would rely on a step-by-step gas increases both on the gas purchased by Ukraine and on the price Russia pays for transit".²⁷

– Javier Solana, *EU High Representative for Common Foreign and Security Policy*

Neither Russia nor Ukraine can afford not to have an agreement. Obviously, Ukraine doesn't want to have their gas prices increased so dramatically, nor do they want to have Russia cut-off their gas supply. On the other hand, Russia wants to continue to expand its presence and revenues in the energy sector and to do that, they are dependant on Ukraine's infrastructure. Like any business, Russia's Gazprom wants to pay as little in transport cost as possible, enabling them to align with international prices. Given these goals, there are several potential negotiated resolutions that could develop.

Path 1

Based on the "tit-for-tat" strategy, each side will mimic the action/reaction of the other. This strategy is founded in integrative bargaining. Although in this scenario, the prices may increase on both sides, the idea here is to maintain a level playing field. This can also become a tactic for stalling and reassessing your position. In addition, this will allow either side to play against the implicit deadline of the other side.

Implication for Russia?

Russia will increase the natural gas prices it charges to Ukraine - to reflect market value. In return for this, Russia will keep the gas flowing. Obviously, a stalling tactic that Russia could use would be to turn the gas off again. Unfortunately for Russia, the implications of this kind of action would extend far beyond Ukraine and thus it is not optimal. A better strategy would be for Russia to stall the negotiations to such a point that Ukraine has no choice but to pay the price Gazprom demands.

Implication for Ukraine?

Given this path, Ukraine will respond equally to Russia's price increases by increasing the prices they charge for transit. One of the moves available to Ukraine is to deny Russia access to its pipeline infrastructure. Not unlike the notion of Russia turning off the flow of gas, this too would have far reaching implications and in the end, would hurt not only Russia, but also Ukraine and much of Europe.. An alternative to this scenario is for Ukraine to take smaller retaliatory measures. This includes increasing the transit price they are charging to Gazprom and deflecting the ire of Gazprom's clients further down the line by shifting blame for price increases to Moscow.

²⁶ The Economist 29th April 2006, "Russian Energy: Customer Relations, Gazprom-style"

²⁷ Weir, Fred "Russia-Ukraine Gas Standoff", *The Christian Scientist Monitor*, 03 Jan, 2006 available online at: <http://www.csmonitor.com/2006/0103/p01s04-woeu.html>

Implication for Europe?

In this situation, the process is only bi-lateral. As a means of preventing the situation from escalating, Europe could offer to step in as a third party mediator.

Path 2

The second scenario sees Ukraine turning directly to Turkmenistan, Kazakstan, and others. This is not far-fetched given that Ukraine is already importing gas from Turkmenistan. In fact, they claim to have been taking that gas from the pipeline after Russia cut them off on January 1. Indeed, the region has a great deal of resources waiting to be developed. “Very substantial gas reserves have also been established in the countries of Central Asia and the Caspian region. Turkmenistan and Uzbekistan each produced well over 50 Bcm of gas in 2003. Kazakhstan and Azerbaijan both have rapidly developing gas industries which will be based on gas production associated with oil, as well as non-associated gas.”²⁸ This scenario is based on the notion that one can apply the negotiating power of threat by seeking a separate arrangement with a third party while continuing negotiations with the first party.

Implication for Russia?

Russia has already hinted that it sees enormous market potential awaiting in Central Asia. This scenario will see Russia focus its efforts on developing and dominating this market, forge ahead with the construction of the North European pipeline, and hence be less reliant on Ukraine as a transit country. The potential drop in Russian exports would create a decrease in its revenue that could combine with an increase of the transit costs demanded by Ukraine. By allowing itself to be put in this situation, Russia would be losing not only part of its market, but also the leverage to negotiate further with Ukraine. In addition, its influence on the regional energy market would decrease substantially, forcing it to seek outlets in other regions, generating high investment costs.

Implication for Ukraine?

“A new natural gas pipeline from the Caspian to Ukraine and Europe would open new opportunities for strategic cooperation between Azerbaijan, Georgia, Ukraine, Poland and other Eastern European countries. With Georgia and Ukraine moving toward NATO membership, this development may bring an additional cementing element to broader Euro-Atlantic cooperation. It would also balance increasing Russian influence in Turkey, and in Europe in general.”²⁹ This is a great idea, but requires a major capital investment on the part of Ukraine. Unfortunately, this is capital they do not have. Their best alternative is to partner with the EU. They have the existing infrastructure to connect with Europe, and could sustain their position as a transit country with multiple partners, reducing the Russian influence and bringing Ukraine closer to the west.

²⁸ Stern, Jonathan, Director of Gas Research, Oxford Institute for Energy Studies, “Natural Gas in Europe – The Importance of Russia”, Available online at: http://centrex.com/de/files/study_stern_e.pdf

²⁹ Tsereteli, Marmuka, Central Asia - Caucasus Analyst, “The Blue Stream Pipeline And Geopolitics Of Natural Gas In Eurasia” available online at: http://www.cacianalyst.org/view_article.php?articleid=3848&SMSESSION=NO

Implication for Europe?

This is an excellent situation for Europe as they are in great need of diversifying their natural gas source. By partnering with Ukraine, they can perhaps save money since Ukraine has a well developed and reliable pipeline infrastructure already in place. In exchange for use of Ukraine's infrastructure, the EU could help fund the development of a pipeline out of the Caspian region, ultimately connecting with the existing pipelines in Ukraine. In addition, Europe would have a stronger negotiating position with Russia.

Path 3

Sometimes it is better to walk away rather than finding a solution. Reaching a mutually beneficial agreement is not always possible or favorable. This scenario would see both sides turning away from the negotiation. Overall, the outcome in this scenario is negative, with the main positive aspect being that it should not last long since the negative implications would likely drive the sides back together again.

Implication for Russia?

From the Russian point of view, the likelihood of this scenario is very slim, for several reasons. First, given that an enormous amount of the current infrastructure runs through Ukraine, it appears that Russia needs Ukraine's pipeline as much as Ukraine needs Russia's natural gas. Second, although there are additional pipelines under construction or in the planning stages, which would bypass Ukraine, they may not be enough. Given Europe's current energy consumption patterns and predictions for future growth, try as they might, Russia may not be able to avoid using Ukrainian pipelines to continue meeting the demands of Europe's consumers.

Implication for Ukraine?

This scenario is a catastrophe for Ukraine. It is not a viable option as the economic and social implications would be extreme.

Implication for Europe?

Europe would be thrown into economic and energy chaos, much like Ukraine. The suspension of Russian gas to the economies of the EU would have great costs, compelling the EU to intervene in the dispute and attempt to force a settlement between Russia and Ukraine.

Path 4

This is a prisoner's dilemma. Clearly, the best outcome is one whereby Russia and Ukraine to work together. This outcome captures the distrust and animosity that is felt on both sides of the bargaining table. Basically, it is in the interest of both countries to demand an exorbitant price increase. However, it is far more beneficial to all concerned if they come to an equitable agreement and stick to it. This path is similar to what we are currently witnessing. In fact, it serves to explain why the parties struck a six-year agreement on the transfer of natural gas through Ukraine and a six-month agreement on the purchase of gas from Russia. This is a game that will continue to be played out.

CONCLUSION

Although both primary negotiating parties seem to be the key actors, the group with the most to lose is potentially the European Union. Thus, something that on the surface appears to be a bi-lateral negotiation between Russia and Ukraine may likely morph into multi-lateral negotiations encompassing either the EU as a whole or EU Member States representing their national interests. In either case, this is a conflict yet to be resolved despite existing and established agreements.

APPENDIX 1

Common Terminology

The terminology listed below (and more) can be accessed online through the Oil and Gas Production Glossary³⁰.

Barrel (bbl)

7.3 bbls = One tonne: 6.29 bbls = One cubic metre: One bbl = 159 litres approx.

Bcf

Billion Cubic Feet (One bcf = 0.176 Mboe)

bcm

Billion Cubic Metres (One bcm = 0.83 MToe)

Gas/Condensate field

Reservoir containing both natural gas and oil, with greater proportion of gas. Condensate appears when gas is drawn from well, and its temperature and pressure change sufficiently for some of it to become liquid petroleum.

Gas field

Field containing natural gas, but no oil.

Gas gathering system

Central collection point for offshore gas fields. Production is then piped to central processing system onshore.

Gas Processing

Separation of oil and gas, and removal of impurities and NGLs from natural gas.

Kilowatt-hour (kWh)

One kWh = 3.6 MJ = 3,412 BTU = 860 kcal = 0.0949 cubic metres of gas)

m / mcf

Thousands / Thousands of Cubic Feet (of Gas)

mm / M

Millions

mmbbbls / mmboe

Million bbls / Million bbls of oil equivalent

³⁰ Glossary of selected oil & gas industry terms, <http://www.eandp.demon.nl/glossary/>

mmscf / mmscfd

Millions of Standard Cubic Feet (of Gas) / Millions of Standard Cubic Feet per Day (of Gas)

Pipeline

A pipe through which natural gas, crude oil or petroleum products are pumped between two points, either onshore or offshore.

tcf

Trillion (a million million) Cubic Feet (of Gas)

APPENDIX 2

The pre-2006 agreement

Below is a translation of the original gas agreement between Ukraine and Russia as it stood leading up to the dispute at the beginning of 2006. It was translated and made available on the site of Ukrayinska Pravda, a national paper in Ukraine. English translation by Olga Bogatyrenko:

“Volumes of Russian natural gas supplied by the Principal to the Executor in compensation for transit services are to be determined annually by intergovernmental protocols and stated in annual addenda to the present Contract.

In case of the principal’s need, the executor can provide an increase in volumes of 52.5 natural gas transited across the territory of Ukraine.

3.3. Changes in volumes of gas supplied and transited are possible upon the agreement of the parties, in which case Hydroelectric Power Station Uzhhorod is to adhere to a quarterly proportion of volumes of gas transit agreed upon in point 3.2 of Article 3 of the present Contract.

Both sides are to conduct negotiations on changes of volumes of transit of natural gas 15 days prior to the beginning of the relevant quarter.

The monthly distribution of quarterly volumes of gas stipulated in point 3.2 is to take place in uniform daily volumes determined by average daily volumes as calculated based on the quarterly volume. Monthly volumes of supply and transit of gas can be changed upon the agreement of the Parties. Mutual proposals on changes to monthly volumes of supply and transit are to be negotiated by the Parties 10 days prior to the beginning of each month.

Natural gas transit routes can be redirected upon a mutually agreed upon written contrast between the parties.

3.4. The monthly gas supply and transit is conducted in uniform amounts that also allow for average daily deviation stipulated in the point 3.2 of the present Contract and which is not to exceed $\pm 5\%$, and not to exceed $\pm 3\%$ for the Uzhhorod hydroelectric power station. In case volumes of Russian gas provided by Gazprom exceed the agreed upon deviation stipulated above in the present Contract and in case there does not exist a contract

allowing Gazprom to store an agreed upon volume of gas necessary to compensate for exceeding the agreed upon deviation in underground gas storage facilities or in case there does exist a contract on storage but there is no written notification submitted by Gazprom to underground gas storage facilities, Gazprom is to provide compensation for exceeding the agreed upon deviation of $\pm 5\%$, and of $\pm 3\%$ for the Uzhhorod hydroelectric power station on the route of the Company's gas transfer on the borders between the Russian Federation and Ukraine and the Republic of Belarus and Ukraine not later than 36 prior to the expected excessive deviation. In this case the Parties agree upon volumes, routes and terms of gas transfer.

In case the Principal fails to compensate for exceeding the agreed upon deviation, the Executor bears no responsibility for assuring receiving and supplying gas in accordance with the stipulations of the present Contract.

(...)

Article 8 Gas Transit Rate

8.1. The rate of transit of 1000 (one thousand) cubic meters of Russian gas across the territory of Ukraine from the borders of Ukraine with the Russian Federation, of Ukraine with the Republic of Belarus, of Ukraine with the Republic of Moldavia to the borders of Ukraine with other European countries, from the border of Russia with the Republic of Moldova to the border with Romania as well as to the border with the Russian Federation for gas transit for consumption in the Kursk region and the South of Russian Federation is established on the basis of annual intergovernmental protocols annually and stated in annual addenda to the present Contract.

Article 9 Payments

9.1. The Parties have agreed that the Principal is to make payments for services provided by the Executor in transporting Russian gas across the territory of Ukraine in accordance with the stipulation of intergovernmental protocols of the corresponding year as stated in annual addenda to the present Contract.

9.2. The Parties have agreed that the price of gas and the price of services and payments as stipulated in the present Contract is to be in US dollars. The payments are to be made in Russian rubles in accordance with the exchange rate based on the estimation of the Central Bank of the Russian Federation as of the day of the payment and on the basis of invoices that are to be provided within 5 days of signing the act that stipulates provision of services and serves as a basis for billing and payment calculations. The Principal is responsible for costs associated with transfers of payments.

9.3. The price of Russian natural gas supplied by the Principal to the Executor as a payment for transit services within the free border of Ukraine is to be determined in accordance with intergovernmental protocols of the corresponding year as stated in annual addenda to the present Contract.

9.4. To determine the moment of transfer of property rights and of distribution of transit costs associated with gas transfer supplied by the Principal to satisfy needs of Ukrainian consumers to gas measuring units, the concept of "DAF" [delivered at frontier] defined as the borders of the Russian Federation and Ukraine and the Republic of Belarus with Ukraine is to be applied (Incoterms 90).

(...)

Article 12 Arbitration

12.1. The Parties are to seek to resolve any disagreements and arguments about interpretation and application of the present Contract via negotiations. In case the Parties cannot arrive at a mutually satisfactory solution within 45 days from the moment of a disagreement or an argument, the conflict is to be resolved in court.⁷12.2. Any dispute arising directly from the present Contract or in relation to it is to be passed over for consideration and resolution of the Arbitration Institute of the Stockholm Chamber of Commerce.⁷The Parties agree that the process of consideration and resolution of disputes is to rely on the rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The legal system regulating the present Contract is the property right of Sweden.⁷Arbitration is to be conducted by three arbiters.⁷Arbitration is to take place in the Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm, Sweden.⁷Russian is to be the language of arbitration. Arbitration ruling is to be final and binding for both Parties.⁷12.3. Point 12.2. of the present Contract on arbitration is to be binding for the Parties, their representatives and their assignees and is to remain in power regardless of expiration or termination of the present Contract.

Article 13 Other Conditions.

13.1. Should any point of the present Contract become legally invalid or inapplicable, it is not to influence validity or applicability of other points of the present Contract. Should any point of the present Contract become legally invalid or inapplicable the Parties are to arrive to an agreement regarding changing the invalid or inapplicable point by a new point whose economic ramifications would maximally approach economic consequences of the invalid or ineffective point.

Article 14 Term of the Contract

14. 1. The present Contract is to enter into force on 1 January 2003.⁷14.2. The present Contract is to remain in force until 10pm on 1 January 2014. The present Contract can be extended if the Parties reach the necessary agreement by 1 July 2013.⁷Expiration of the present Contract does not influence rights or responsibilities of the Parties, which could have accumulated before the expiration of the present Contract.

Signed in Kharkiv on 21 June 2002.

(...)

Addendum No.4 To the Contract Between National Joint-Stock Company “Naftogaz of Ukraine”⁷Kyiv, Ukraine⁷And⁷Open Joint-Stock Company “Gazprom”⁷Moscow, Russian Federation⁷On Volumes and conditions of transit of Russia’s natural gas across the territory of Ukraine from 2003 to 2013 signed on 21 June 2002.

Moscow 5 August 2004

The national joint-stock company “Naftohaz of Ukraine” (NJSC) subsequently referred to as the Executor represented by the Vice Chair of Management Voronin Ihor Pavlovych acting as the proxy in accordance with the document of 1 January 2004 No.14-24, on the one side.

And OAO Gazprom (Russian Federation) subsequently referred to as the Principal represented by Vice Chair of Management Ryazanov Aleksandr Nikolaevych acting as the proxy in accordance with the document of 20 November 2003 NoD-17-453d, on the other side.

Jointly referred to as Parties.

Have agreed to enter the following additions to the Contract between the OAO "Gazprom" and the NJSC "Naftohaz of Ukraine" on volumes and conditions of transit of Russia's natural gas across the territory of Ukraine from 2003 to 2013 signed on 21 June 2002:

Article 9 is to include point 9.8 stipulating the following:

"The Principal is to make a prepayment to the Executor for a sum of \$1 250 000 000 (one billion two hundred and fifty million US dollars; subsequently referred to as the credit) as partial prepayment for transit services of natural gas across the territory of Ukraine provided by the Executor during the period from 2005 until the end of 2009. The amount of the prepayment is to be transferred in equal amounts of \$250 million each year in accordance with the following schedule:

\$250.000.000 – to be transferred in 2005

\$250.000.000 – to be transferred in 2006

\$250.000.000 – to be transferred in 2007

\$250.000.000 – to be transferred in 2008

\$250.000.000 – to be transferred in 2009

The prepayment is to be made in US dollars transferred to the dollar account of the Executor held at the joint-stock bank of the gas industry of the "Gazprombank" or at the Bank of External Economic Activity of the USSR.

The Executor, in accordance with the Contract, is to provide transit services of the natural gas across the territory of Ukraine during the period from 2005 until the end of 2009 based on the transit rate of \$1,09375 per 1000 cubic meters of case per each 100 km, which is not negotiable by the Parties.

The Principal is to provide Ukraine with gas as payment for transit services of Russian natural gas across the territory of Ukraine priced at \$50 per 1000 cubic meters provided by the Executor, which is not negotiable by the Parties.

Monthly rate for services and monthly schedule of payments of the prepayment is to be determined by annual addenda to the present Contract.

The Executor is to guarantee the Principal fulfillment of duties in accordance with the present article on conditions acceptable to the Principal.

The present Addendum is to enter into force after all of the below stipulated conditions are met:

The Council of Directors of the OAO "Gazprom" approves prepayment for gas transit services to be made by the OAO "Gazprom" to the NJSC "Naftohaz of Ukraine" 7The OAO "Gazprom" is to provide the NJSC "Naftogaz of Ukraine" with a notification about absence of any outstanding balance due by the NJSC Naftohaz of Ukraine" to the OAO "Gazprom" in relation the fact that the OAO "Gazprom" made concessions, including fines and penalties, about its demands on the contracts about Russian natural gas supplied but not paid for during the 1997-2000 period.

The NJSC "Naftogaz of Ukraine" is to notify the OAO "Gazprom" of successful implementation of domestic procedures necessary for receiving the prepayment7The NJSC "Naftogaz of Ukraine" is to notify the OAO "Gazprom" about bank routing and account numbers of the dollar account held at held at the joint-stock bank of the gas industry of the "Gazprombank" or at the Bank of External Economic Activity of the USSR.

The two copies of the present Addendum, which is an integral part of the Contract, are in Russian and are distributed to each of the Parties.

Other conditions stipulated by the Contract remain unchanged and binding for the Parties.

Signed: 7Vice Chair of Management of the NJSC “Naftohaz of Ukraine”, I. P. Voronin
 7Vice Chair of Management of the OAO “Gazprom” A. N. Ryazanov”

APPENDIX 3 - EUROPEAN NATURAL GAS - IMPORTS(CU M)

RANK	COUNTRY	NATURAL GAS IMPORTS (cu m)
1	Germany	85,020,000,000
2	Ukraine	60,400,000,000
3	Italy	54,780,000,000
4	France	40,260,000,000
5	Netherlands	20,780,000,000
6	Belarus	18,500,000,000
7	Spain	17,260,000,000
8	Belgium	15,400,000,000
9	Hungary	9,587,000,000
10	Czech Republic	9,521,000,000
11	Poland	8,782,000,000
12	Slovakia	6,600,000,000
13	Austria	6,033,000,000
14	Bulgaria	5,800,000,000
15	Romania	5,400,000,000
16	Finland	4,567,000,000
17	Ireland	3,384,000,000
18	Switzerland	3,093,000,000
19	Lithuania	2,760,000,000
20	United Kingdom	2,700,000,000
21	Portugal	2,553,000,000
22	Moldova	2,018,000,000
23	Greece	2,018,000,000
24	Latvia	1,700,000,000
25	Estonia	1,270,000,000
26	Georgia	1,100,000,000
27	Croatia	1,080,000,000
28	Slovenia	1,040,000,000
29	Sweden	968,000,000
30	Luxembourg	867,000,000
31	Bosnia and Herzegovina	300,000,000
32	Serbia and Montenegro	0
33	Norway	0
34	Denmark	0
35	Albania	0

Source: [http://www.indexmundi.com/map.aspx?v=Natural+gas+-+imports\(cu+m\)&co=eu&lesson=y](http://www.indexmundi.com/map.aspx?v=Natural+gas+-+imports(cu+m)&co=eu&lesson=y)

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TURKISH ACCESSION TO THE EUROPEAN UNION: NEGOTIATION ANALYSIS

Mads Aarøe Mathiesen

ABSTRACT

This chapter applies a negotiation analysis to the case of Turkey's accession to the European Union (EU). It finds that the EU identifies a required "to-do-list" for Turkey rather than facilitating a two-way dialogue and bargaining process. Consequently, two variables are left as the most important in determining the likelihood of and timeframe for Turkey becoming an EU member. These variables are (1) the extent to which Turkey complies with the requirements set by the Union, and more importantly, (2) whether the momentum in European integration – or the internal agreement about expansion – will be sustained.

In analyzing the future of the Turkish-EU negotiations one should look at developments in Turkey and its politics, but even more attention ought to be paid to internal bargaining between the governments of the EU-25. While recognizing the importance of actual negotiations, this paper is interested exclusively in the meta-framework as is set up before the negotiations started.

INTRODUCTION

Turkey has been an associate member of the exclusive European Community club since 1963 and an official membership candidate since 1999. In December 2002, the European Council¹ announced a landmark decision that if Turkey met the 'Copenhagen Criteria' by the end of 2004, the EU would open negotiations without delay. Thus, in December 2004 the European Council formally accepted to begin accession negotiations with Turkey. On 17 June 2005 the individual European heads of state affirmed this decision while the Commission in turn presented a framework for negotiations on 29 June that same year. After a full day of intense internal negotiations between the 25 EU foreign ministers striving to finalize the framework, accession talks with Turkey officially opened on 3 October 2005.

This text demonstrates how some analytical tools from the negotiation discipline can be applied in order to understand the meta-context of the EU-Turkey relationship. Drawing on Raymond Saner (2005) it outlines the political issues surrounding the negotiations between the EU and Turkey; analyzes the framework of the negotiations; presents the actors and their respective stands on some of the issues, and makes some

¹ Up to four times a year the heads of state of the member states together with the president of the European Commission meet as the European Council. These meetings set the overall policy of the Union and makes decisions that could not have been taken by lower-level ministers at normal meetings in the "Council of the European Union" also known as the "Council of Ministers". See also the website of the Council of the European Union www.consilium.europa.eu or Urwin (1996: 56) for an elaborate definition.

procedural observations; and finally demonstrates how two aggregate meta-variables can help outline some scenarios for what might happen in the accession process over the course of time. As such, this case is an example of a multi-lateral integrative bargaining process, and by the same token, it showcases that third parties such as the US may not be instrumental to the negotiation process.

POLITICAL ISSUES

At least six issues deserve special attention as they affect the accession of Turkey into the EU. Several of them are inherent obstacles and relate to demographic, social and economic differences between the EU and Turkey while others are more political in nature.

The first issue is rooted in religious affairs and has to do with the role of Islam in Europe and Turkey. Europeans, who are traditionally Christian, increasingly perceive Islam as “a transruptive force that, through transculturation processes, might be able to challenge the alleged Judaeo-Christian heritage of Europe.”² While 98% of the population of Turkey is Muslim,³ the secularization of Turkish society has been increasingly questioned after the Justice and Development Party (AKP) has become the nation’s largest political party.⁴ And so relations between the two parties are more or less explicitly affected by religious differences.

Secondly, Turkey continuously refuses to recognize the state of Cyprus, which is now a member of the EU. The Council decision of 2004 entailed a compromise formula on Cyprus upon which both sides were expected to work towards a solution before the scheduled membership talks. However, these talks have opened without a resolution to the Cyprus conflict. In effect, Turkey does not fully recognize all of the members of the EU and so this could be seen as the biggest obstacle to the accession discussions that only can be solved by a diplomatic “escamotage” or a shift in the Turkish strategy.

Thirdly, only three percent of Turkey is within the technical geographic limits of Europe. Thus, the accession of Turkey means an extension of the EU’s limits into Asia, bordering core Middle Eastern countries. Valéry Giscard d’Estaing, former French President and the man in charge of overseeing the drafting of a “constitution for a united Europe,” speaking to an interviewer from *Le Monde* on 8 November 2002, declared further that Turkey’s “capital is not in Europe, and 95 percent of its population is outside Europe. It has a different culture, a different approach, and a different way of life. It is not a European country.” EU membership for Turkey would mean “the end of Europe.”⁵

Fourthly, the relatively lower economic development of Turkey causes concern that accession will be expensive for the Union, especially considering its current agricultural policy and regional funds programme. In Turkey agriculture accounts for more than 35 pct of employment, while textiles and clothing is one of the biggest export industries. Turkey’s GDP per capita is \$8.900 (PPP) compares to \$31.400 (PPP) in the UK and Germany⁶ and the relative high Turkish growth has been interrupted by sharp declines in output. Only

² Marranci 2004, p. 105

³ BBC News, 23 December 2005

⁴ e.g. Tekin 2004; Güney 2004

⁵ Teitelbaum, 2007, p. 98

⁶ CIA, World Fact Book, 2006 (estimated)

47% of the Turkish population is in the workforce, which compares to the EU goal set in the Lisbon objectives of a 70% active workforce.⁷

Fifthly, Turkey's demographics outweigh any European country in terms of growth and seize. Turkey has a young population with a median age of 28.1 years compared to for example 42.6 years in Germany and 39.9 in the UK⁸. The Turkish population growth rate is 1.06 pct compared to -0.02 pct in Germany and 0.28 pct in the UK⁹. By 2015 Turkey will have about 82 million citizens and thus have a size equal to Germany and elect the same number of Members of the European Parliament, and while German population will stagnate like in the rest of the EU, the population of turkey will raise and stabilize at around 95 million in 2050¹⁰. The 2015 population prediction would give Turkey the same voting power (14%) in the Council as Germany and with three other states it could rally the 35% of the EU population necessary to veto decisions.

Sixthly, Turkish Human Rights violations and issues of gender equality, minority rights (e.g. women, Kurds and non-Muslims) have long been concerns for the EU. Recently, however, Turkey has passed notable reforms to abolish the death penalty and give all detainees the right to legal council. Moreover, the long-standing denial of modern time's first genocide – in Armenia – is still a delicate subject with the Turks.

COMPLEX NEGOTIATIONS: A FRAMEWORK OF MULTI-LATERAL INTEGRATIVE BARGAINING

The negotiations truly do have a complex nature. On the Turkish side is a state in the traditional sense, and all its ministries together with most of its public institutions are involved in the accession process. The Turkish prime minister has clearly made EU-related issues a priority, which in turn means that practically all public institutions will be part of Turkey's accession efforts. In this vain The Prime Ministry has set up a whole Secretariat General for EU Affairs coordinating the efforts of the central administration. Hence, diplomats are far from being the only players and interventions and talks are undertaken both between agencies under the European Commission and specialized agencies within Turkish institutions, as well interaction with external stakeholders and counterparts in the EU.

The Turkish Treasurer Ali Babacan has been appointed as chief negotiator and will be responsible for the implementation of the accession process in Turkish legislation. Meanwhile, Ankara's negotiation team to the Council will be led by Foreign Minister Abdullah Gul.

In effect all the Ministries have appointed staff to be the "permanent contact point."¹¹ Along these lines, Babacan has described the structure of Ankara's negotiating team as "flexible and dynamic."¹² Among the multitude of public bodies and organizations involved, some of the most important are: The Secretariat-General for EU Affairs (Oguz Demiralp), Turkey's permanent representative to the EU (Volkan Bozkir), Directorate for Political Affairs (Ambassador Ahmet Acet), Directorate for Economic and Financial Affairs (Deputy Secretary General Tunay Ince), Directorate for Planning Affairs (Deputy

⁷ Akçakoca, Cameron and Rhein, 2004

⁸ CIA, World Fact Book, 2006

⁹ Ibid. (estimated)

¹⁰ Akçakoca, Cameron and Rhein, 2004

¹¹ EuroActiv

¹² *ibid*

Secretary General Mustafa Dönmez), Directorate for Commercial Affairs (Deputy Secretary General Sukran Yazici), Foreign Ministry's EU affairs department, Undersecretariat of the Prime Minister's Office in charge of EU affairs, and the State Planning Organization.

Non-governmental organizations (as well as universities, etc) will also be actively involved in the country's EU integration process. Events such as "civil society summits," will be organized on a regular basis to "improve" public opinion in Europe.¹³

Things are even more complex on the side of the EU, with 25 member nations and multiple institutions under the EU umbrella. While each Member State can have its own opinion on Turkish membership, they have to make unanimous Council decisions on the subject. The role of the Commission therefore, is to make recommendations to the Council and, in effect, prepare them to make decisions. Other crucial roles of the Commission, and in particular for the Directorate General for Enlargement are to write the Negotiating Framework and publish progress reports.

With a mandate from the Council, the Commission is preparing most of the negotiations on behalf of the European Union but when it comes to the actual negotiations of each of the chapters of the *acquis*, the decision has to be made in the Council of Ministers and ratified by the heads of state.

The negotiations take the form of an intergovernmental "accession conference" between all the EU Member States and Turkey. The outcome of a successful negotiation is an agreement in the form of an "accession treaty." Before it can come into effect, the treaty requires ratification by the national Parliament of each Member State as well as the candidate country, and approval by the European Parliament. In other words, it is the so-called "intergovernmental method" that applies, making it a very long and complicated route for a treaty to enter into force.

ACTORS AND POSITIONS

Article 2 of the "Negotiating Framework" authored by the Commission states that the negotiation is "*an open-ended process, the outcome of which cannot be guaranteed.*" At the same time, analysts tend to point out that there has been no case in EU history where accession negotiations, once started, have not led to an offer of full membership.¹⁴ Outside the immediate framework of the accession negotiations, the EU expects Turkey to normalize its ties with all of its neighbors, primarily Greece, Cyprus, and Armenia, before joining the Union. Ankara must also do its best to reconfigure European public opinion in its favor.

The United Kingdom

The UK remains committed to the EU's continued enlargement, and considers it a priority to take a positive stand in the membership talks with Ankara. In this way Britain can be seen as a "leader" in the Council.¹⁵ However, in light of the recent failed referenda on the EU Constitution and the perceptible mood-swing in certain European political circles, it may prove difficult for London to keep up the push for momentum in the process. Turkey is

¹³ *ibid*

¹⁴ Euroactiv 2005

¹⁵ Saner. 2005. pp185-86

a significant trading partner of the UK. In 2002, Britain was Turkey's third largest export destination and sixth largest import source. Total bilateral trade for 2002 reached 3,7 billion pounds.¹⁶

France and Austria

To date, Austria might be the most skeptical member state in the opposition towards Turkish membership.¹⁷ Austria has historically been the guardian of Christian Europe and marked the boundaries to the Ottoman Empire. However, in comparison with France, Austria might be more of a gatekeeper, while France plays the role of the real “Anti-leader” with its traditional opposition to the UK.¹⁸

France, along with Austria, has pledged to hold a referendum on Turkey's EU accession, appears increasingly skeptical on the issue, and seems to prefer avoiding negotiations. While President Chirac has been a “lukewarm” supporter of Ankara's ambitions, the referendum on the EU Constitution brought to the fore the French public's reservations. In June last year, Chirac said that the EU should re-examine the planned enlargement, and called for a summit to be held on how the process should be pursued. Issues in France such as the fear of another wave of Muslim immigrants together with major problems integrating previous immigrants, are significant factors behind this position.

French companies are listed as the biggest investors in Turkey, although France ranks only fifth in terms of investment volume. Turkey exported US\$ 2.12 billion worth of goods to France in 2002, while the value of its imports amounted to US\$ 1.76 billion. France ranks as the Turkey's fourth largest source of tourism.¹⁹ Meanwhile, the largely anti-Islamic far right has been making significant advances on the French political scene, against the backdrop of slightly increased public reluctance to admitting new members to the EU.

Greece

Greece, Turkey's traditional enemy, especially with regards to the Cyprus conflict, has by now practically become a cheerleader for Ankara's EU membership. According to Athens, it is better to have Turkey inside the club than outside. “*We simply believe that if and when Turkey joins the European Union it will be obliged to observe these rules and values. This will by itself resolve most of our problems,*” said former Greek Defence Minister Yannis Papantoniou. The government of Greek Prime Minister Costas Karamanlis continues with this goodwill approach.²⁰

Germany

Germany's former Chancellor Schroeder was a major supporter of Turkey's bid for EU accession. The present Chancellor, Angela Merkel, previously a harsh critic of Turkish accession, has softened since the beginning of her tenure. After meeting the Turkish

¹⁶ EuroActiv 2005

¹⁷ International Herald Tribune. See 29 September 2005 edition. Available on line at www.ihf.com

¹⁸ Saner. 2005. p186

¹⁹ Euroactiv 2005

²⁰ *ibid*

premier, she stated: "*We talked about the fact that 'pacta sunt servanda' applies,* ²¹ *and that things will develop well.*"²² The shift in Merkel's stand may be explained by the strong economic ties between the two countries, the fact that Germany is home to more than 2,5 million Turks, and that 600 000 of them are German citizens.²³ Germany is Turkey's most important commercial partner in the EU. Their bilateral trade has tripled over the past decade and amounts to some 14 billion Euro *per anum*. Fourteen percent of Turkey's exports go to Germany and in turn, seventeen percent of Germany's exports go to Turkey. On top of these economic ties there are nearly 1 100 German companies operating in Turkey today, and over three million German tourists visit Turkey each year.

CURRENT PROCESSES

Screening

The most important part of the "Substance of the Negotiations" is article 10-17 of the *acquis*. In preparing the Negotiating Framework, the *acquis* was split into 35 chapters with the purpose of "*dividing the most difficult ones into separate chapters for easier negotiation, uniting some easier chapters, moving some policies between chapters, as well as renaming a few of them in the process.*"²⁴

For the first phases of the negotiations, the Commission launched a "screening process" aimed at taking stock of Turkey's progress in harmonizing its laws with those of the Union. The screening is conducted in all the areas defined by the 35 chapters of the negotiating framework (see annex). The process may take ten to eleven months to complete.²⁵ The conclusion of the screening process will mark the opening of negotiations on the individual chapters. First to be negotiated will be the less controversial chapters, such as those on culture and education.

Since 2000, Ankara and Brussels (in connection with the customs union) have carried out a process similar to screening, and thus rapid progress is foreseen in certain chapters. The screening is to be conducted in two stages. During the first "analytical screening" stage, the Commission will explain its *acquis* to Turkey, while in the second – "detailed or bilateral screening" – stage it would be Ankara's turn to explain its laws. The screening process is scheduled to last about a year.

Meanwhile, once the Commission considers Turkey's compliance sufficient in a given chapter, it then proposes the opening of the negotiations on that chapter. This means that the decision on when to start and conclude negotiations is made for each chapter individually. The opening of membership negotiations requires ratification by all 25 EU member states. Each member state has veto power on the opening and closing of the negotiations.

²¹ *pacta sunt servanda* is the latin for "agreements must be respected"

²² Reuters, 27 November 2005

²³ EuroActiv 2005

²⁴ <http://en.wikipedia.org/wiki/Acquis>. The preliminary indicative list of chapter headings is attached in the annex to this paper.

²⁵ EuroActiv 2005

Procedures and 'To-Dos'

Under the Negotiating Framework approved by the EU-25 and Turkey in early October 2005, the pace of the de facto negotiations was determined by Turkey's progress in meeting the requirements for membership. Based on the Commission's progress reports the process will be regularly reviewed by the Council. The Council will establish benchmarks for the opening and provisional closure of each chapter, and will communicate these benchmarks to Ankara. Turkey in turn will have to regularly report on its progress in meeting these benchmarks.

According to Paragraph 2 of the Negotiating Framework, subject to hot debate at the October 2005 Council meeting, "The shared objective of the negotiations is accession. These negotiations are an open-ended process, the outcome of which cannot be guaranteed beforehand. While having full regard to all Copenhagen Criteria, including the absorption capacity of the Union, if Turkey is not in a position to assume in full all the obligations of membership it must be ensured that Turkey is fully anchored in the European structures through the strongest possible bond."²⁶

Should Turkey "seriously and persistently" breach the "principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded," the Commission (on its own initiative or on the request of one third of the Member States) would be "entitled to recommend the suspension" of the negotiations and propose the conditions for their eventual resumption.²⁷ The ultimate, qualified majority, decision would then rest with the Council, and the European Parliament will be informed.

The Negotiating Framework says that:

Long transitional periods, derogations, specific arrangements or permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as freedom of movement of persons, structural policies or agriculture. Furthermore, the decision-taking process regarding the eventual establishment of freedom of movement of persons should allow for a maximum role of individual member states. Transitional arrangements or safeguards should be reviewed regarding their impact on competition or the functioning of the internal market.²⁸

Turkey has also undertaken to accept the results of any other accession negotiations between the EU and other candidate countries as they stand at the moment of its own accession. Turkey's compliance with the *acquis* will be verified and the progress of the negotiations will be measured against the following three requirements:

Firstly, the Copenhagen Criteria, containing the following points:

- the rule of law, the stability of institutions guaranteeing democracy, human rights and respect for and protection of minorities;
- a functioning market economy and the strength to be a competitive player in the internal market of the Union;

²⁶ Commission 2005: 1

²⁷ Presidency Conclusions of the Brussels European Council of 16 and 17 December 2004

²⁸ Commission 2005: Substance of the Negotiations

- the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union and the administrative capacity to effectively apply and implement the *acquis*

Secondly, Turkey's commitment to good relations with its neighboring countries and its undertaking to resolve any outstanding border disputes in conformity with the principle of peaceful settlement of disputes in accordance with the United Nations Charter, including if necessary jurisdiction of the International Court of Justice.

Thirdly, Turkey's continued support for a settlement of the Cyprus problem in the UN framework and in line with the principles on which the EU is founded, including progress in the normalization of bilateral relations between Turkey and the Republic of Cyprus and Greece.²⁹

Furthermore, if a chapter is declared to be 'temporarily closed,' it means that the candidate country is found by the Commission to be below EU standards in that specific field. Once temporarily closed, a chapter can be re-opened for further negotiation at any time. The EU may consider long transition periods, derogations, specific arrangements or permanent safeguard clauses in its proposals for each of the chapters. Since Turkey's membership would have significant financial implications, it can only be concluded after 2014 when the new financial framework of the EU is established. The negotiations can be suspended in case of a "*serious and persistent breach (...) of the principles of democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded.*"³⁰

Contemplating this framework, the EU clearly is playing "Power Play," taking an agenda-setting role. Turkey can, to a large extent, only follow the path set out by the Union. In this way "negotiation" may not actually be the most accurate word for the overall process since the talks follow the usual agenda when a new member is accessing the Union: the full body of European law accumulated so far (*acquis communautaire* or simply *acquis*) has to be adopted rather than negotiated by the candidate country. On the other hand, the negotiation part concerns how the *acquis* is merged into the national setting, and how Turkey is conducting its relations with other nations.

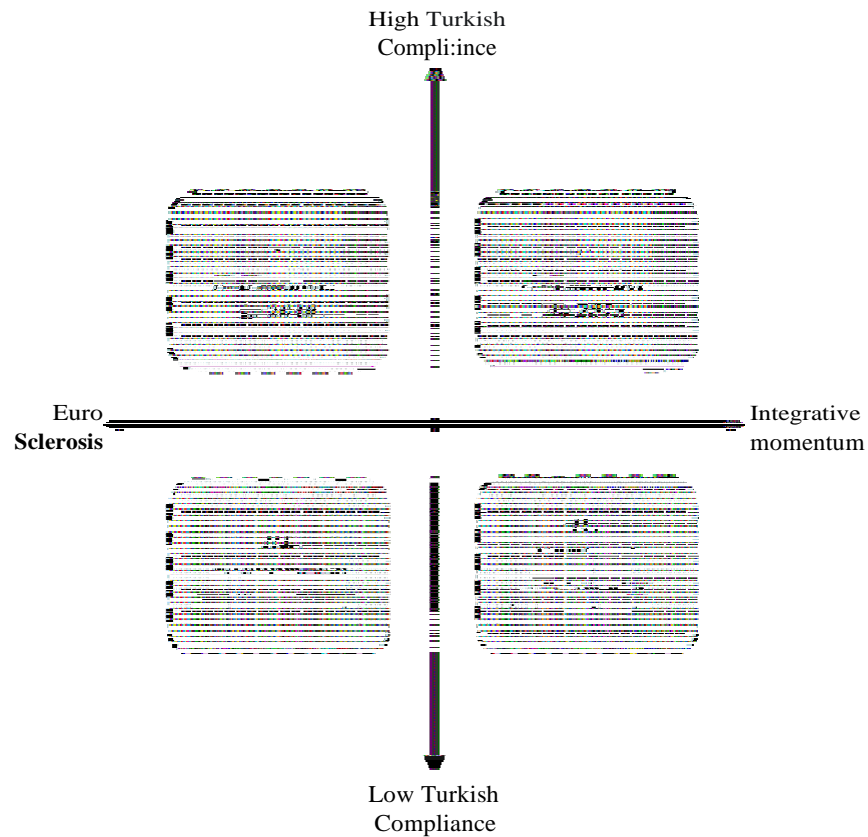
SCENARIOS

This section evaluates possible scenarios or negotiation outcomes between the EU and Turkey.

Four basic scenarios can be sketched out according the two simple variables: (1) the momentum of European Integration and (2) the level of Turkey's compliance with the guidelines of the Copenhagen Criteria and the *acquis*. It is important to note that these variables are different from (though dependent on) most of the political issues raised in section 2. Any of the political issues can thus obstruct negotiations, and third parties (such as the US) can play a role – though one of less importance.

²⁹ Extracted from the Commission's Strategy Paper 2003; EuroActiv 2005

³⁰ EuroActiv 2005

Figure 1: Scenario Tree for Turkish Accession*Scenario 1: Full member in 2030*

This scenario appears likely if Turkey remains highly compliant to the demands of the EU, but the European project has internal problems that drag out the accession talks. The trend of turning down the European Constitution (in France and The Netherlands) with more public resentment continues and individual member states such as France and Austria are persistently blocking Turkish membership. British internal politics and a shift in the leadership of the Labour party weakens the British push for accession.

Scenario 2: Full member in 2015

If Turkey is highly compliant and Europe gets back on the integrative path, early accession of Turkey is very likely. The negotiations will go smoothly, and the opposing countries (France as the “counter-leader” and Austria as the “gate-keeper”) will not be an obstacle to Turkey’s membership. The political issues are mostly resolved by political compromises, diplomatic omissions or actual changes in the strategies applied. In this scenario Turkey would be a full EU member in less than ten years.

Scenario 3: No Membership / No Agreement

For in favor of Turkey as a full-blown member of the Union, then this is the worst possible scenario. The ‘euro sclerosis’ continues to hamper expansion of the Union. At the same time Turkey does not comply with the established guidelines. There is no room to even identify a common Zone of Possible Agreement, and status quo remains. Several events could provoke such a situation. Among them is a take-over by the powerful Turkish Army or a groundbreaking resurgence of Political Islam. On the part of the EU it could be significant resistance in public opinion, a total lack of leadership, and/or a breakdown of cooperation among Member States.

Scenario 4: No Membership / Privileged Partnership

The last scenario here occurs when the European momentum of European Integration is high and Turkey’s compliance is low. In this case an agreement of a “Privileged Partnership” rather than full membership is likely. In such a scenario, it is also possible that Turkey will not become a member of the EU at all.

CONCLUSION

Turkish accession talks with the EU are a set of highly complex negotiations with multiple stakeholders, and are marked by multi- and pluri-lateral negotiations.

The EU is clearly playing “Power Play” and setting the agenda to be followed during the course of the talks. Thus far the EU strategy has been successful. Turkey is mobilizing its entire central administration to live up to the accession criteria, and is improving on some of the political issues nagging the Union. As the process is going so smoothly, an early accession scenario is possible. However, the political issues that are largely separated from the interaction of bureaucrats will be the “dark-horses” in the race towards a European Union embracing its Turkish neighbors to the east.

ANNEX

The Negotiating Framework: Preliminary indicative list of chapter headings

Chapter	Explanatory meeting	Detailed meeting
1. Free movement of goods	16-20 Jan 06	20-24 Feb 06
2. Freedom of movement of workers	19 Jul 06	11 Sep 06
3. Right of establishment and freedom to provide services	21-22 Nov 05	19-20 Dec 05
4. Free movement of capital	25 Nov 05	22 Dec 05
5. Public procurement	7 Nov 05	28 Nov 05
6. Company law	21 Jun 06	20 Jul 06
7. Intellectual property law	6-7 Feb 06	2-3 Mar 06
8. Competition policy	8-9 Nov 05	1-2 Dec 05
9. Financial services	29-30 Mar 06	2-3 May 06
10. Information society and media	12-13 Jun 06	13-14 Jul 06
11. Agriculture and rural development	5-8 Dec 05	23-26 Jan 06
12. Food safety, veterinary and phytosanitary policy	9-15 Mar 06	24-28 Apr 06
13. Fisheries	24 Feb 06	31 Mar 06
14. Transport policy	26-29 Jun 06	25-28 Sep 06
15. Energy	15-17 May 06	14-16 Jun 06
16. Taxation	6-7 Jun 06	11-12 Jul 06
17. Economic and monetary policy	16 Feb 06	23 Mar 06
18. Statistics	19-20 Jun 06	17-18 Jul 06
19. Social policy and employment (incl. anti-discrimination and equal opportunities for women and men)	8-10 Feb 06	20-22 Mar 06
20. Enterprise and industrial policy	27-28 Mar 06	4-5 May 06
21. Trans-European networks	30 Jun 06	29 Sep 06
22. Regional policy and co-ordination of structural instruments	11-12 Sep 06	9-10 Oct 06
23. Judiciary and fundamental rights	6-8 Sep 06	11-13 Oct 06
24. Justice, freedom and security	23-25 Jan 06	13-15 Feb 06
25. Science and research	20 Oct 05	14 Nov 05
26. Education and culture	26 Oct 05	16 Nov 05

27. Environment	3-11 Apr 06	29 May-2 Jun 06
28. Consumer and health protection	8-9 Jun 06	6-7 Jul 06
29. Customs union	31 Jan-1 Feb 06	13-14 Mar 06
30. External relations	10 Jul 06	13 Sep 06
31. Foreign, security and defence policy	14 Sep 06	6 Oct 06
32. Financial control	18 May 06	30 Jun 06
33. Financial and budgetary provisions	6 Sep 06	4 Oct 06
34. Institutions		
35. Other issues		

Source: <http://www.euractiv.com/en/enlargement/eu-turkey-negotiations/article-145219>

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THE ORINOCO OIL FIELDS: THE VENEZUELAN GOVERNMENT AND CONOCO PHILIPS

Shabnam Mirsaedi

ABSTRACT

In an increasingly industrialized and complex world, demand for oil has reached new levels whilst supply has been restricted due to limited natural resources. The rising increasing trend of nationalization of oil resources and restrictions on multinational ownership and operational abilities has further encouraged international oil insecurity. This chapter seeks to highlight the potential outcomes of integrative negotiations between Venezuela and ConocoPhilips following Venezuela's decision to nationalize the Orinoco Belt. Whilst all multinationals have agreed to enter negotiations with the government, ConocoPhilips has been resisting negotiations. Utilizing J. Sebenius' International Negotiation Analysis framework, this chapter seeks to analyze the critical factors influencing the position of each party. The author observes that the negotiations between Venezuela and Conoco are shaped by value creation alternatives for each party in order to develop a possible zone of agreement.

INTRODUCTION

In the 1960s, the world consumed 6 million barrels of oil annually, while petroleum field discoveries amounted to 30 to 60 million barrels a year. Today, world consumption exceeds 30 million barrels a year while discoveries have decreased to 4 million barrels annually.¹ Parallel to increasing demand, national governments have more and more sought to limit access by multinationals to their national oil reserves and to limit international market competition. About 77% of the world's 1.1 trillion barrels in proven oil reserves is controlled by governments that significantly restrict access to international companies.² Venezuela is the fifth largest oil exporter in the world, and supplies about 13% of daily oil imports into the US. The oil sector accounts for more than three-quarters of total Venezuelan export revenues, about half of total government revenues, and about one-third of total GDP.³ As a member of the Organization of Petroleum Exporting Countries (OPEC), Venezuela is not only bound by domestic needs and demands but also by the organisation's agreements. Venezuela's oil therefore holds a key position affecting domestic revenues and international markets.

In February 2007, Venezuelan president Hugo Chavez ordered the nationalization of the Orinoco oil fields in two stages: the hand-over of foreign operations to Petr6leos de Venezuela SA (PDVSA) by 1 May 2007, and the negotiation of agreements by 26 June 2007. All multinationals have agreed to hand-over operations and negotiate agreements, with the exception of ConocoPhilips.

¹ Eric Laurent, *La Face Cachée du Pétrole*, 425.

² Justin Blum, "National Oil Firms Take Bigger Role Governments Hold Most of World's Reserves."

³ Energy Information Administration, Official Energy Statistics from the US Government, *Venezuela*.

Using this overarching question of potential Conoco/Venezuela negotiation in mind, the paper utilizes J. Sebenius' *International Negotiation Analysis* to understand the critical factors influencing the position of each party and the zone of possible agreement. This paper first presents the importance of the Orinoco Belt, then notes past behavior of the parties suggesting potential negotiation outcomes. It is followed by a section that identifies the interests and positions of each party, as well as options and alternatives to negotiated agreements. The final section will highlight two of the most likely options.

ORINOCO BELT: FEBRUARY 2007 – MAY 2007

In 2004, PDSVA, Venezuela's national petroleum company, was unable to maintain production capacity and was in a consistent decline compared to previous years. Venezuela's strategic interest to attract foreign multinational companies for technological and financial support was met with meager support abroad. Multinationals were not keen on investing in the Orinoco Belt partly due to the need for extra heavy crude oil exploration in which they had limited experience only.⁴ Government incentives of 34% tax rebates and a 1% royalty fee⁵ provided sufficient incentives for Chevron Corp., Exxon Mobil Corp., ConocoPhillips, Statoil and BP Plc to invest in the Orinoco Belt.⁶

Today, other oil fields in Venezuela are in decline whilst it is believed that the Orinoco belt contains up to 235 billion barrels of recoverable oil, rivaling Saudi Arabia who has the largest reserves worldwide, with 261.9 billion barrels.⁷ The six oil companies have invested an estimated \$17 billion in the Orinoco oil fields.⁸ The four Orinoco projects, valued at more than \$30 billion, turn tar-like oil into around 600,000 barrels per day of lighter synthetic crude.⁹ The Orinoco Belt is the last of the non-nationalized oil fields, still remaining open to multinationals – at least until 1 May 2007.

Domestic developments in Venezuela significantly impacted the energy sector. Promising social justice in the twenty-first century, in January 2007 Chavez succeeded in convincing the National Assembly to pass the Enabling Law, permitting an accelerated transformation of Venezuelan socialism and justice. The law allows Chavez to pass laws by decree in eleven different areas for a period of 18 months.¹⁰ On 1 February, whilst addressing the public in his daily radio program "*Alo Presidente*" he announced the nationalization of the Orinoco oil fields by 1 May. Rafael Ramirez, Energy Minister, clarified that the four heavy crude joint ventures in the Orinoco Belt were no longer permitted to have a combined share of more than 40% in each of the projects, thereby giving PDVSA a minimum share of 60%.¹¹ One of the main publicly stated reasons has been that "Venezuelan Oil Belongs to Venezuela"

⁴ Oliver Campbell, "Attempts to offset oil depletion in Venezuela through the heavy oil processing," *Energy Bulletin*.

⁵ The new oil reform law of 2001, however, nearly doubled royalty payments to 30% of the price at which every barrel is sold. At the same time, the government lowered the income tax levied on oil extraction from 67.6% to 50%.

⁶ Angel Gonzales, "Venezuela to finish Orinoco nationalization in 6 months," *Market Watch*.

⁷ Steve Christ, "Oil, Chavez and the Orinoco Belt," *Energy and Capital*.

⁸ Gregory Wilpert, "Venezuela Decrees Nationalization of Lat Foreign Controlled Oil Fields," *Venezuela Analysis*.

⁹ "Conoco, Chevron Agree to May 1, 2007, Handover," *Epoch Times*.

¹⁰ Annex 1 shows the eleven areas of strategic interest as defined by the Enabling Law

¹¹ Liza Figueroa-Clark, "Venezuela's Chavez Sets Oil Fields Takeover for May," *Venezuela Analysis*.

HISTORICAL PRECEDENT IN VENEZUELA

As the last foreign-owned oil fields in Venezuela, previous oil nationalization in the country had provided some historic precedent in the relationship, negotiation process and possible agreements between multinational corporations and the Venezuelan government. The transfer of twenty-two foreign and locally owned oil fields to the PDVSA in 2005 set a precedent for Venezuela's nationalization schemes. The Venezuelan government demanded a minimum share of 60% for PDVSA in all light crude oil projects in the country, arguing that the agreements signed under the previous governments violated Venezuelan law, which prohibited majority ownership to foreign companies.¹² This ended 32 operating agreements that were not due to expire before 2012 at the earliest. All foreign multinationals with the exception of ExxonMobil and Total negotiated agreements based on compensation of book value rather than net present value in the form of voucher mechanism that give credit towards future investments in the country. Venezuela seized two oil fields, one from Total (TOT) another from Eni after failing to reach compensation agreements within the determined timeframe.¹³ Direct negotiations with Exxon were not fruitful, but the company decided to sell its share to Repsol, who was entering joint ventures with Venezuela.¹⁴

The previous nationalization scheme notes that the Venezuelan government will not permit exceptions to the minimum share of PDVSA and will not compensate in cash or present-value. Precedent suggests three options for companies: 1) a voucher mechanisms for future investments; 2) the government seizes oil fields; 3) selling assets to a company willing to follow Venezuela's demands.

VENEZUELA'S INTERESTS AND CRITERIA

The terms of the nationalization process of the Orinoco fields were determined by President Chavez. The decree required a minimum 60% interest to PDVSA, transfer of operations to PDVSA by 1 May and a final negotiated agreement by 26 June. The Energy Minister clarified that Venezuela does not "...expect to spend money to be able to reach an agreement with the companies."¹⁵ Nonetheless, the government did not rule out compensation settlements involving crude oil or larger production areas for multinationals. The multinationals should not expect the Venezuelan government to buy the \$4 billion outstanding commercial bonds and bank loans as a result of the construction of the four oil projects in Orinoco – President Chavez considers the cost to be mutually shared by all participants.¹⁶

Chavez's strategy and interest are twofold, trying to meet a combination of domestic and international interests. Domestically, Chavez's presidential term had been built on "Socialism in the 21st Century" and popular support encouraged and pushed him further to nationalize strategic economic sectors. He argues that the oil in Venezuela belongs to the Venezuelans and that the revenues would be essential for social programs. This first domestic argument based on the revenue factor only partially explains the

¹² Jens Gould, "Venezuela tightens oil grip," *Christian Science Monitor*.

¹³ Raul Gallegos and Peter Milliard, "Venezuela to only recognize bookvalue in Orinoco deals," *Dow Jones News Wire*.

¹⁴ "Exxon out: PDVSA and Repsol set oil deal."

¹⁵ "Conoco may have to "leave" the country, Venezuelan minister."

¹⁶ Peter Milard, "Big Oil Faces Tough Talks on their Talks in Orinoco Patch."

domestic interests. A general anti-Western policy, particularly critical of the United States, supports the nationalization of the Orinoco oil fields as a mean to increase control over a strategic sector of Venezuela and away from the 'hands' of the west.¹⁷ Other recent policies, such as Venezuela's withdrawal from the World Bank and the re-nationalization of the electricity sector follow similar reasoning, suggesting an overall anti-Western trend.

At the international level, Chavez's reasoning is based on two important criteria: Organisation of the Petroleum Exporting Countries (OPEC) and new alliances. OPEC's interest to cut oil production in order to stabilize high oil prices has historically interfered with the production curve of the multinationals operating in the Orinoco fields. Past demands by the Venezuelan government to multinationals on cutting oil production to meet OPEC requirements have been ignored and even though the Venezuelan government has officially dismissed OPEC production requirements as an interest in re-nationalization, the additional revenue attached to decreased production is a significant force. Finally, Venezuela's foreign policy and marked alliance building with countries such as Iran and Cuba support the domestic anti-western sentiments. Alliances with oil exporting countries such as Iran and the mutual interest in Iran's investments in Venezuela's energy sector suggest a diversification of energy trade partners to match with political agendas.

Venezuela's interests are two-fold – based on both domestic and international interests. Its strategy is grounded in financial interest, policy ideologies and the requirements of its OPEC membership. Overall, Chavez has marketed his strategy as the new face of socialism meeting the demands of his constituency. Nonetheless, the Chavez's interests assume a continuously productive oil sector in the Orinoco projects and thus the underlying interest suggests a role for the expertise and capital of multinational corporations to sustain oil production and revenue. In order to enable the long-term or even short-term vision of "Socialism in the 21st Century," the government requires revenues to balance the increased public spending for social programs.

CONOCO-PHILIPS INTERESTS AND CRITERIA

ConocoPhillips has the sixth-largest total of proved reserves worldwide and is the fifth-largest refiner of crude oil internationally. It has the largest presence of any foreign company in the Orinoco belt, holding the largest stakes in two of the four projects. Its interests are shaped by its financial commitments in the area, the terms of its contract as well as future stakes in the worldwide oil production. Conoco's position in the Orinoco is best captured by its majority shareholder position in two exploration and production projects, *Petrozuata* and *Hamaca*. In addition, it is engaged in two business and development projects in *Corocoro* and *Plataforma Deltana 2*.

Both the *Petrozuata* and the *Hamaca* project have a 35-year contract that commenced in 2001 and 2004, respectively, binding the corporation and Venezuela to terms of production and revenue sharing. While the *Petrozuata* project reached full capacity in 2003, the *Hamaca* project only reached full capacity in 2005. ConocoPhillips holds a majority share of 50.1% in the Petrozuata project and the largest share (40.1%) in the *Hamaca* Project (see Annex 2).¹⁸

¹⁷ Considering the potential impact that tighter control of the world's oil supply could have on the United States - the world's largest oil consumer (20,730,000 bbl/day) followed by China, which only consumes 6,534,000 billion barrels/ day.

¹⁸ "Exploration and Production of ConocoPhillips," *ConocoPhillips Factbook*.

Besides two exploration and production projects, Conoco holds interest in two business and development projects: *Corocoro* and *Plataforma 2*. The *Corocoro* project was initiated in 1999 and equipped with four wells in 2001-2002. In 2005, the Venezuelan government approved a wellhead platform and drilling to begin in 2006. First production from the central processing facility was expected in 2008. ConocoPhilips holds a 32.2% interest in the project. Conoco acquired a 40% interest share in the *Plataforma 2* project in 2003. The project may include the development of a well platform in approximately 300 feet of water and a 170-mile pipeline to shore. The contract specified that in the case of these developments, PDVSA has the option to enter the project with a 35% interest, reducing Conoco's interest to 26%.¹⁹

Conoco's interests are both present and future-oriented. The past investment in the Orinoco belt amounting to a total of an estimated \$17 billion among the four projects with the multinational interests counting on the profits made only once full capacity has been reached. Full capacity, however, has only been reached relatively recently, allowing for limited remuneration and significantly increasing the losses of multinationals if they chose to step away completely. At the same time, the internationally diminishing oil reserves and the battle to maintain a strong stake in a market that promises increased prices due to possible shortages, makes potential future profits from the Orinoco belt more important. International oil security has increased the stake of actors in the oil market. Limited access by multinationals to national oil reserves has increased the need to maintain a stake in profitable ventures for as long as possible. International pressure from shareholders to increase profits in a world of fewer oil opportunities encourages ConocoPhilips to keep a stake in the Orinoco fields.

Negotiations therefore, need to carefully balance the company's trilemma of maintaining a stake in a future promising oil market, minimizing past losses in the Orinoco Belt and face-saving policies for the company and its shareholders, keeping in mind as well international oil security and the general strength of the company.

NEGOTIATION OPTIONS

The interests and limitations of each party suggest five distinct options for a negotiated agreement between ConocoPhilips and Venezuela: Compensation with crude oil to the oil companies, compensation with larger operations, voucher mechanism for future investments, compensation by other means (but not in cash) and tax breaks and royalty fees.

Both parties recognise the importance and sensitivity of compensation. Whilst for Venezuela only book value compensation by other than financial means is plausible, Conoco has to return to its shareholders a reasonable offer considering its significant stake and past investments. Past agreements made by Venezuela in the course of the nationalization of the energy sector suggest the potential for compensation of multinationals through crude oil at a value agreed upon by both parties and/or a negotiated larger share of operations in future projects.

Other forms of compensation, not involving a direct cash transfer from Venezuela to Conoco, may be linked to the transfer of associated operations or investments in other sectors in Venezuela. Venezuela is keen to keep a minimum share of foreign multinationals that offer know-how, capital and experience in the country. Thus, compensation to please

¹⁹ Ibid.

both parties is vital. Similarly, decreasing the supply of petroleum suggests an important strategic position in the Orinoco Belt.

An option of more potential interest to Venezuela is the voucher mechanism for future investments in the country. This option will guarantee capital flows from the developed countries into Venezuela but at a rate determined by Venezuela. At the same time it will ensure a stake in the future of the Venezuelan economy for Conoco.

Finally, greater tax breaks and decreasing royalty fees have been incentives in the past. Potential future profits along with government incentive packages need to be balanced against past losses and future political risks in Venezuela when determining the profitability of new investments in Venezuelan oil.

The pareto solution would include among other things non-cash value creation compensation, a minority stake for Conoco in the Orinoco projects, and agreement on production levels.

SWOT analysis of each position

Analyzing the position of both Venezuela and ConocoPhilips, potential areas of agreement emerge due to both parties' interests and alternative value creation (integrative bargaining). As J. Sebenius suggested in his *International Negotiation Analysis*, differences between negotiators do not have to divide but may be complementary to permit additional value creation for both parties.²⁰ In this negotiation process the Zone of Possible Agreement (ZOPA)²¹ is mainly formed by each party's needs and optional value creations (see Table 3).

The Venezuelan government maintains sovereignty over the country's territory. This territorial sovereignty gives it also the rights to manage natural resources on its territory – in this particular case, crude oil. Nonetheless, Venezuela does not have sufficient capital and know-how to continue production without any joint ventures. To offset this, Venezuela offers incentives to foreign companies to stay as smaller shareholders in the Orinoco projects. If Venezuela does not succeed in attracting enough investment, it risks having insufficient means to sustain production, arriving at a point where losses from a lower production volume exceed the additional revenue stemming from higher world oil prices.

ConocoPhilips is the majority interest holder in two of the Orinoco projects and has the sixth largest total of proved oil reserves in the world. It possesses the capital and expertise of refining heavy crude oil into lighter synthetic oil. Yet its powerful position as an American multinational also is one of its biggest weaknesses. Chavez's anti-US government policies do not allow the company to have direct majority control over the strategic and profitable sectors. The Venezuelan decree, coming at a time when only little of the investments had been recuperated significantly shook the future of the company and its shareholders in Venezuela. Losing a share in this scarce resource market might translate into significant losses in the future vis à vis Conoco's direct competitors.

Venezuela has openly stated its main reservation price (i.e. that which it will not go below): 60% minimum PDVSA share, no debt repayment, no cash compensation and compensation only at book value. Meanwhile, Conoco's position is less evident. It seeks to represent the interests of its shareholders, and maintain its profit margins, but will also

²⁰ James K. Sebenius, "International Negotiation Analysis," Victor A. Kremeneyuk (ed.) *International Negotiation*: 239.

²¹ Raymond Saner, *The Expert Negotiator*. Chapter 2 p. 42

consider future opportunities. Venezuela may maintain the upper hand. Its natural resources give it leverage and other petroleum companies, such as Chevron and Total, are interested in the crude oil able to effectively replace Conoco's capital and technology resources.

Best Alternative to Negotiated Agreement

The significant differences amongst compensation methods and expenses, as well as potential future political risks in the country, may not allow the parties to reach a negotiated agreement immediately. Considering each actor's best-alternative-to-a-negotiated-agreement (BATNA) sheds light on additional interests for both parties to reach a negotiated agreement rather than leaving the negotiation table.

Venezuela has the option to bring the matter to its national court, seize the oil fields without negotiations, and break future ties with ConocoPhilips. Due to the political structure of Venezuela, the national courts are likely to rule in favor of the country rather than the company, but such a ruling might not be in Venezuela's short and long term favor. Whilst the government has taken nationalization measures, its shortage of capital and technology to maintain oil production levels forces it to maintain some level of multinational presence. This past reasoning in recognition of the need to attract foreign investments will likely continue during Chavez's administration with a distinct difference in the tone and limits of these joint ventures. This reality makes the total abandonment of future relations with ConocoPhilips costly – not only financially but also in technology, know-how and competitor gains. This unofficial reliance encourages more cooperative behavior towards the multinational.

ConocoPhilips's BATNA lies in alternatives to negotiations such as exit arbitration overseen by the World Bank or departure from the negotiation table without compensation. Considering Venezuela's withdrawal from the World Bank, the Bank's jurisdiction over Venezuela is controversial making such arbitration not applicable to Venezuela and consequently decreasing the chances of an arbitrated agreement. Alternatively the company may also consider selling its shares to another multinational which is willing to enter a joint venture with Venezuela at the imposed terms.

Non-negotiated agreements are costly for both parties – more so than the present and future costs of negotiated agreements. Therefore, whilst alternatives to negotiated agreements remain a possibility, they are unlikely future scenarios.

LIKELY FUTURE PROSPECTS

Questioning the likelihood of an alternative to an agreement, two broad options remain: negotiation with compensation or selling to a third party. The competitiveness of the oil market and the limited world resources strengthens Venezuela's position; however, capital requirements to maintain production capacities strengthen the position of ConocoPhilips (although other multinationals may be able to replace the company).

In the first scenario, Venezuela and ConocoPhilips agree on a compensation package that will allow ConocoPhilips to maintain a presence in Venezuela and make sufficient profit to please its shareholders. This agreement is likely to be based on oil compensation or larger operation shares. ConocoPhilips will accept the package, hoping that future revenues from the fields will compensate for short-term losses. The current supply and demand trends of the oil market suggest that the restricted supply of oil will ensure increasing prices. Alternative technologies that could decrease demands for oil are

not very advanced and industrial giants such as China and the United States are likely to maintain a steady demand.

The second scenario is based on the inability of the parties to negotiate an agreement. However, rather than have its shares seized, Conoco will sell them to another multinational corporation that is willing to enter or remain in the Orinoco fields. In this scenario Conoco estimates that the risks of staying in the market are higher than the past investments and opportunity cost. Conoco's competitors will gain a greater share of crude oil, likely impacting Conoco's international share of oil reserves. Yet, the difficulty in predicting future developments in Venezuela does not discount the possibility of more stringent laws if oil revenues increase. The government has set a precedent for not holding up contractual agreements and the cost of such uncertainty might exceed the revenues.

CONCLUDING REMARKS

At the most fundamental level, the position of Venezuela and Conoco reveal some degree of mutual dependence. This visible mutual dependence is highlighted in the negotiations between Venezuela and ConocoPhilips. Both parties' positions are shaped by internal and external pressures: most notably by Venezuela's access to oil reserves and its need for capital to build its production capacities and Conoco's interest in maintaining interests in the Venezuelan oil reserves and remuneration options. This dependence is shaped by external forces manifested in international oil security concerns, increased international demands and a trend of oil company nationalization and on the other hand, a need for supporting national development and maintaining revenue levels.

The Conoco strategy will predominantly rest on establishing Venezuela's dependence on the company's resources due to its unique capacities (namely technology and capital) in order to prevent replacements by other multinationals. In exchange for these services, Conoco seeks an agreement that will minimize the economic losses of its previous investments, and maximize its shares in the Orinoco Projects for potentially more significant future profits.

Venezuela's strategy hinges on its promising future access to oil reserves that may be larger than those of Saudi Arabia - a very significant incentive for multinationals to maintain maximum shares (40%) in the Orinoco projects. Venezuela is interested in meeting its obligations to OPEC and reducing production if necessary. At the same time, domestic promises of new social programs require higher revenues to balance the accounts. Prior to multinational investments and involvement in the Orinoco Belt PDVSA was not been able to reach production capacity and therefore Venezuela is likely to consider cooperative agreements to enable production capacity in the future.

There are many uncontrollable forces in this negotiation process, shaped by limited internal information vis-à-vis specific shareholders, long-term Venezuelan strategy and domestic sentiments. However, two major uncertainties shape the negotiation path of both Venezuela and ConocoPhilips: first, how large are the oil reserves in the Orinoco Belt and second, how long will the Venezuelan's honor their new contractual agreements. The perception of both actors vis à vis these uncertainties determines their willingness to compromise, create additional value opportunities, and encourage the negotiation process.

The actors' positions towards these uncertainties are carried over into their analysis of potential options in the negotiations. The options of minimizing the costs of investments or maximizing future profits are fundamental to the negotiation process and will shape the direction of negotiations – either towards agreements that take into

consideration compensation needs and abilities of Conoco and Venezuela respectively, or alternatives to negotiated agreements (see Annex 3). An integrative negotiation approach emphasizing value creation by both sides to enlarge the negotiated pie will be fundamental to a settlement. Considering the 'reservation price' of both actors, some alternatives are more or less likely to be reached. Venezuela has openly set its 'reservation price' – a minimum 60% share for PDVSA. By stating the price openly and agreeing with other multinationals, it will be difficult for Conoco to obtain a different reservation price, unless it can prove to be of additional value to Venezuela. Other multinationals who have previously reached agreements based on Venezuela's demands, weaken ConocoPhilips' negotiation position since Venezuela's crude oil has attracted significant international interest due to its potential impact on the world market.

The example of Venezuela-Conoco negotiations point out three general issues of negotiation procedures between states and multinationals: first, the geopolitical position of the country as well as its status of economic development are fundamental in determining the balance of give and take in the negotiation process; second, the value of the service or product being offered by the stakeholders is influenced by external pressures, often market forces, and as such is subject to greater uncertainties; and finally, these type of negotiations are often shaped by political factors - both the internal politics of the actors and the overarching political environment.

ANNEX 1

Enabling Law

1. Transformation of the state, where laws are to be passed that make the state more efficient, honest, participatory, rational, and transparent.
2. Popular (grassroots) participation, in the economic and social policies of the state, via planning, social control, and the direct exercise of popular sovereignty.
3. Essential values for the exercise of public functions, so that corruption would be eradicated definitively, the strengthening of ethics, and the formation of public servants.
4. In the area of economic and social policy, so as to create a new sustainable economic and social model. The goal is to achieve equality and the equitable distribution of wealth through investment in health care, education, and social security.
5. Finances and taxation, to modernize the regulatory system in the monetary, banking, insurance, and tax systems.
6. Citizen and judicial security, for the improvement of citizen identification, migration control, and the fight against impunity.
7. Science and technology, so it is developed to satisfy the needs of education, health, environment, biodiversity, industrialization, quality of life, security, and defense.
8. Territorial order, for a new distribution and occupation of subnational space, so as to improve the activities of the state and of endogenous development.
9. Security and defense, for the development of the structure and organization of the Armed Forces.
10. Infrastructure, transport, and services, to promote the existing human and industrial potential for the optimization of land, rail, sea, river, and air transportation, as well as of telecommunications and information technology.

Source: “Proyecto de ley que autoriza al presidente de la República para dictar decretos contentivos de actos con rango, valor y fuerza de ley en las materias que se le delegan exposición de motivos.” *Agencia Bolivariana de Noticias*. 16 January 2007. www.abn.info.ve/proyectedeleyhabilitante.php

ANNEX 2

*Shares of ConocoPhilips in projects in the Orinoco Belt**Table 1 Exploration and Production Projects in Venezuela*

<i>Areas</i>	<i>Interest</i>	<i>Operator</i>	<i>Other Interest Holders</i>
<i>Petrozuata</i>	50.1%	Petrozuata	PDVSA 49.1%
<i>Hamaca</i>	40.1%	Petrolera Ameriven	Chevron 30%, PDVSA 30%

Table 2 Business and Development Projects

<i>Areas</i>	<i>Interest</i>	<i>Operator</i>	<i>Other Interest Holders</i>
<i>Corocoro</i>	32.2%	Petrozuata	Chevron 35%, Eni 25.8%, OPIC 6.4%, IneParia 0.6%
<i>Plataforma Deltana</i>	40%	Petrolera Ameriven	Chevron 60%

ANNEX 3

Interest, Negotiation, and Best-Alternative-To-Negotiated-Agreement Summary

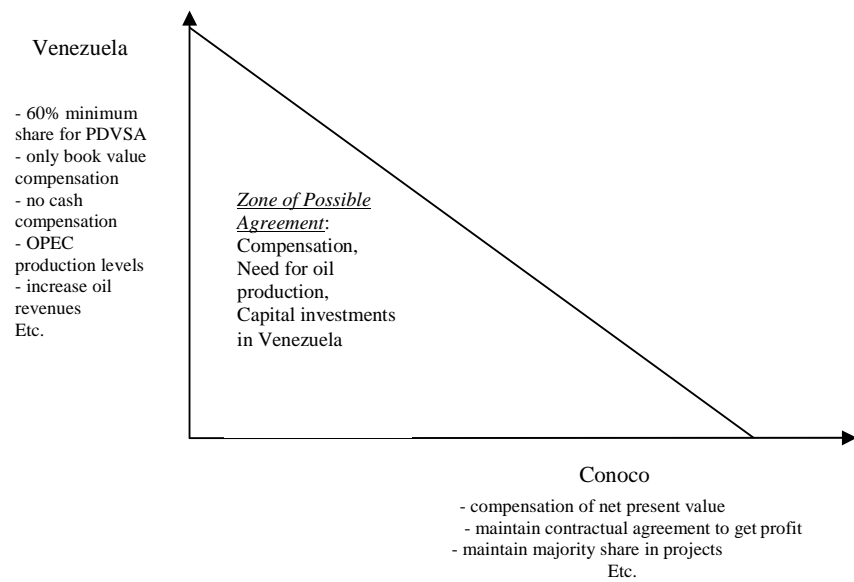
INTERESTS		OPTIONS	COMMUNICATION	BATNA	
Venezuela's interests	Conoco Philipps's interests			Venezuela's BATNA	Conoco Philipps's BATNA
<ul style="list-style-type: none"> • Minimum 60% interest to PDVSA • Maintain foreign investment in the country (at 40% or less) • Nationalization of strategic sectors to maintain control and increase profit • Cut oil production level to OPEC requirements to stabilize high oil prices • Venezuelan Socialism in the 21st century – Oil belongs to the Venezuelan People – revenues for social programs • New alliances with like-minded countries such as Iran 	<ul style="list-style-type: none"> • Compensation of present net value • Share of oil profits (due to world wide diminishing reserves) • Maintain face and profit/minimize losses of shareholders 	<ul style="list-style-type: none"> • Compensation with crude oil • Compensation with larger operations • Voucher mechanism for future investments • Compensate (but not in cash) • Tax breaks and royalty fees 	<p>Venezuela:</p> <ul style="list-style-type: none"> • Avoid any calculation of net present value • Open negotiations to permit public to view unwillingness of multinationals to cooperate <p>Conoco:</p> <ul style="list-style-type: none"> • Calculate net value to identify magnitude of investment 	<ul style="list-style-type: none"> • Go to national court • Stop relations in the future • Seize oil fields 	<ul style="list-style-type: none"> • Exit Arbitration • No compensation • Sell share to foreign company that will engage in joint venture with Venezuela
		CRITERIA	UNDERTAKING		
		<ul style="list-style-type: none"> • Venezuela will only recognise book value not present net value • Preserve relation in the future • Limited capital restricts cash compensation value • Debt will be forgiven 	<p>Venezuela:</p> <ul style="list-style-type: none"> • Investment in other sectors • Minority shares to maintain some revenue <p>Conoco:</p> <ul style="list-style-type: none"> • Future involvement in Venezuela • Access to technology, know-how, capital 		

ANNEX 4

Summary of SWOT Analysis of Venezuela's and ConocoPhilips' positions

	<i>Strength</i>	<i>Weakness</i>	<i>Opportunity</i>	<i>Threats</i>
<i>Venezuela</i>	<ul style="list-style-type: none"> - Sovereignty over Venezuela's territory. - High-value and scarce natural resource on its territory 	<ul style="list-style-type: none"> - not sufficient capacity to develop energy sector in isolation - agreements (contracts) with MNC 	<ul style="list-style-type: none"> - offers compensation agreements - alternative compensation methods - OPEC production capacity -> greater revenue 	<ul style="list-style-type: none"> - significant drop in productivity and high oil prices won't make up for loss in revenues
<i>ConocoPhilips</i>	<ul style="list-style-type: none"> - substantial capital and expertise 	<ul style="list-style-type: none"> - MNC headquartered in the US - likely to lose significant investments 	<ul style="list-style-type: none"> - maintain strong position vis à vis other companies in the Venezuelan market 	<ul style="list-style-type: none"> - lose share of the petroleum market (as it increases profit)

ANNEX 5

Utility Figure of Venezuela and Conoco negotiations

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CUBAN OIL: MIRAGE OR OASIS?

A MULTI-ACTOR CONFLICT IN SEARCH OF AN AGREEMENT

Léo Julien Pagnac

ABSTRACT

In 2004, the renowned US Geological Survey (USGS) released a report assessing the undiscovered oil and gas resources of the North Cuban basin. According to the report, the North Cuba Basin held a substantial quantity of oil, 4.6 billion to 9.3 billion barrels of crude oil and 9.8 trillion to 21.8 trillion cubic feet of natural gas – almost as much as in the Arctic National Wildlife Refuge in Alaska. Major foreign oil companies, the latest being the Chinese oil and gas giant Sinopec, are now eagerly investing in Cuba and working hand in hand with Cuba Petroleo (CUPET) to explore the identified fields.

The prospect of oil companies drilling so close to US shores worries many US Observers. First, on the economic side, due to the Helms-Burton Act, US companies are disqualified from this oil rush and the oil that Cuba is about to drill does not respect national borders. For the first time the embargo against Cuba may have a great economic cost. Second, some groups, mainly in the state of Florida, are worried about the ecological consequence of drilling in Cuba.

Finally, this oil “game” is embedded in the Cuban national context; the looming death of Fidel Castro may cause a fissure in the political stalemate that has lasted for more than forty years. The imminent disappearance of its most symbolic figure may trigger some radical changes in the US political posture against Cuba. The Partido Comunista Cubano (PCC) will surely face many challenges to remain in power and will have to silence US and international community calls for more democracy.

INTRODUCTION

Cuba and the oil rush in 2007

Since Fidel Castro’s ascent to power in 1959, and the subsequent foundation of the Communist Party of Cuba (PCC), two factors have strongly consolidated the party’s position: the charisma of Fidel Castro, and the backing of a foreign power, such as the Soviet Union. Today in 2007, the PCC is on the edge of losing both of these elements. Since the collapse of the Soviet Union in the early 1990s, a major source of financial and material aid has been cut off. While other nations have stepped in to fill the gap, notably Hugo Chavez’s Venezuela and the People’s Republic of China, neither carries the same weight on the international political scene as the USSR once did given its role as the counterbalancing superpower against the United States. This loss of support also resulted in changes within the Cuban economy, which have led the PCC to loosen restrictions on private business in order to keep the economy afloat. While recent aid from the aforementioned nations has led to a partial reversal of this economic policy, the PCC must decide what form the economy should take in the global marketplace.



SOURCE: NY TIMES

The oil discovery in 2004 from the Spanish oil company Repsol-YPF¹ in partnership with Cuba's state oil company, CUPET, however, may brighten both the future of Cuba and the PCC. Indeed, five fields classified as "high-quality" have been identified in the deep waters of the Florida Straits, 20 miles northeast of Havana. Although Cuba has been on the look out for oil – not always successfully – the confirmation later by the U.S. Geological Survey² initiated the Cuban oil rush. According to that report, the North Cuba Basin holds a substantial quantity of oil, 4.6 billion to 9.3 billion barrels of crude oil and 9.8 trillion to 21.8 trillion cubic feet of natural gas, almost as much as in the Arctic National Wildlife Refuge in Alaska. As shown by the map³ the Cuban exclusive economic zone in the Gulf of Cuba is very close to the US shore

¹ See Whelan Carolyn's article : "Castro's revenge: The Cuban oil rush", Fortune

² A very interesting analysis was made by the USGS in 2004 corroborating the results of the Spanish company Repsol

YPF http://walrus.wr.usgs.gov/infobank/programs/html/factsheets/pdfs/2005_3009.pdf

³ This map clearly evidences the sensitivity of the issue. Map presented in Janofsky Michael, "As Cuba Plans Offshore Wells, Some Want U.S. to Follow Suit." *New York Times*

Indeed, some drilling could be at a distance of less than 80 kilometers from Key West Island.

Cuba wasted no time dividing the 120,000 square kilometer area into 59 exploration blocks (as shown by the map) and then welcoming foreign oil conglomerates with offers of production-sharing agreements. The rush for the choicest blocks began with the arrival of Repsol YPF in 2002. Today, out of the 59 exploration blocks available, the rights for 20⁴ have already been negotiated by foreign investors (the latest being Sinopec, the second largest oil and gas Chinese giant).

There is no denying that the prospect of foreign oil companies drilling Cuban wells so close to American shores has had an unnerving effect on Capitol Hill. The Cuban oil issue has attracted increasing attention as China is now exploring in the Florida Straits. Senators Bill Nelson and Jeff Flake are currently questioning the Helms-Burton Act, an embargo banning the US companies to invest in Cuba. They argue that the oil fields Cuba is drilling do not necessarily respect national borders and therefore any oil Cuba finds and extracts could siphon off fuel that otherwise would be available to drillers off the Florida coast and oil-thirsty Americans. Consequently, there is a strategic cost in not being involved in this process.⁵

Moreover, since 1981, the U.S. has observed a moratorium on coastal drilling, except for a portion of the Gulf of Mexico and limited areas off Alaska. The ban on drilling was enacted after a series of high-profile oil industry environmental disasters. Perhaps the most notorious: the 1969 Santa Barbara spill that released 3 million gallons of oil in waters off California, coating 56 kilometers of coastline with oil up to 15 centimeters thick.

Therefore, US oil and gas companies find themselves squeezed between a moratorium on coastal drilling that prevents them from drilling in Florida's deep coastal waters, and the Helms-Burton Act forbidding them from investing in Cuba. They argue that the twenty year old U.S. ban on drilling in coastal waters is driving up domestic energy costs and, in this case, is giving the US's two chief economic competitors – China and India – access to energy at its own expense.

Nevertheless, one year ago, a U.S.-Cuba Energy Summit attracted representatives from ExxonMobil and a handful of smaller oil service companies to three days of meetings in Mexico City. Attendees viewed presentations from Cuban government ministries including the state-owned oil company CUPET that invited American companies to help exploit several giant oil and gas fields. Thus, regarding the embargo, even if the US political scene seems to favor the status quo, on the contrary CUPET is not afraid to openly tease the appetite of already very interested US firms.

For now, one must admit that big US companies are staying out of the political fray. But, we should consider that, at a time when unexplored terrain is rapidly shrinking, the oil industry would eagerly jump into Cuban waters if given the chance.

⁴ See the extensive work of the Dr. Benjamin-Alvarado Jonathan from the University of Nebraska, Omaha. Notably is special report for the World Security Institute "Cuba, Oil, and National Security", World Security Institute, August 2006

http://www.wsicubaproject.org/alvaradoenergy_0806.cfm#_ftn1

⁵ The Interior Department estimates that the Outer Continental Shelf has more than 115 billion barrels of oil and 633 trillion cubic feet of natural gas available for extraction. At current levels of consumption, that would satisfy U.S. oil needs for about 16 years and its natural gas needs for about 25 years.

DESCRIPTION OF THE CONFLICT: ISSUES AND ACTORS

The Issues at Stake

In 1977, the United States and Cuba signed a treaty that evenly divided the Florida Straits in order to preserve each country's economic rights. This included access to vast underwater oil and gas fields on both sides of the line. Now, with energy costs soaring, plans are under way to drill this year, but only on the Cuban side. With modest energy needs and no ability of its own to drill, Cuba negotiated lease agreements with many foreign investors and most recently with China and India, two energy-hungry countries, permitting extraction for them and for Cuba. Cuba's drilling plans have been in place for several years, but now that China, India and others are involved and fuel prices are unusually high, a growing number of lawmakers and business leaders in the United States are starting to complain.

The main issue seems to reside in the fact that since the 1963 embargo, US companies have not been able to invest or otherwise take part of the actual oil race that is happening today in Cuba. Nonetheless, other issues can be identified that overlap and complement the embargo debate:⁶

- US companies are excluded from all aspects of the oil business in Cuba, including oil fields, service and equipment sales, while China and India are now investing
- US companies in others sectors, especially in agro-business are banned from Cuba due to Helms-Burton Act
- US companies are not able to drill within 322 kilometers of shorelines because of 1980s congressional bans
- The 1977 maritime boundary agreement between the countries bisecting the Straits of Florida and allowing Cuba to perform commercial activities (e.g., oil drilling) near the Florida Keys is renewed every two years
- Drilling for oil off the Cuban coast poses major environmental risks and undermines long-term conservation efforts.
- Any exemption to the embargo may alleviate the pressure on Cuba and consequently make the political aim of the embargo – the end of the Castro regime – inefficient and impossible.

THE KEY ACTORS AND THEIR INTERESTS:

Cuban actors

<i>Actors</i>	<i>Description</i>	<i>Interests</i>	<i>Nature of interest</i>	<i>Position on embargo</i>

⁶ See Benjamin-Alvarado Jonathan, "The Problems and Prospects of a Sustainable Energy Future in Cuba";

<i>Cuba Petróleo (CUPET)</i>	Cuban national oil and gas company. It has been collaborating with foreign companies such as Sherritt International since 1996 for on-shore drilling in Varadero.	Without the collaboration of US oil companies and their technologies, oil production is more expensive and less productive	Economic/Political	Against
<i>Oficina Nacional de Recursos Mineros (ONRM)</i>	Created by the mining law in 1995, it controls, regulates and supervises all oil and mining activities. The ONRM monitors the delimitation of marine boundaries between the US, Mexico and Cuba	To maintain the actual marine boundaries with the US and to renew the 1977 treaty with the US that expires every two years.	Economic/Political	Against
<i>Ministerio de Industria Básica</i>	It regulates the petroleum and mining industry and supervises all the contracts in these sectors. CUPET reports directly to this Ministry.	To maximize the exploration of the zone in the North of la Havana	Economic/Political	Against
<i>The Partido Comunista Cubano (PCC)</i>	Chaired by Fidel Castro, it defines the international and economic strategy of Cuba.	Use the oil bonanza to attract the US oil companies and alleviate the burden of the embargo. To break down the embargo making it too costly for the US to be left out of this strategic opportunity.	Economic/Political	Against

The Cuban actors are all in favor of dropping the embargo on oil. Being able to receive the US know-how regarding deep-water operations and the prospect of having access to the US oil market are of great appeal to Cuba – not to mention the fact that a “hole” (oil exemption) in the embargo may trigger the end of the overall embargo scheme. Indeed, some exemptions already exist in the embargo, for instance the US Cuban Democracy Act’s literal wording grants “exceptions for commercial and humanitarian exports of medically related goods and for donative (i.e., noncommercial) exports of food.”⁷ The Cuban authorities are aware that the U.S. oil industry now stands to benefit

⁷ Section 1705 of the CDA exempts “donations of food to nongovernmental organizations [NGOs] ...[and] individuals in Cuba.” Section 1705 further exempts “exports of medicines or medical

from oil exploration in Cuban waters, and proposed legislation could further crack the monolithic anti-Castro front by making another embargo exception, in this case for energy companies. The new legislation, titled the “Western Hemisphere Energy Security Act of 2006,” and labeled H.R. 5353 in the House and S. 2787 in the Senate, seeks to provide oil companies with a lucrative loophole to the administration’s otherwise unrelenting hard-line stance. This exception will allow US oil firms to pursue oil exploration in Cuban-controlled waters, and is justified as an attempt to resolve the energy crisis through collaboration with the Cuban government. This sets up the use of oil by Cuban actors as a bargaining tool to undermine the whole embargo.⁸

Foreign oil companies:

<i>Actors</i>	<i>Description</i>	<i>Interests</i>	<i>Nature of interest</i>	<i>Position on embargo</i>
<i>Sherritt international (Canada)</i>	Invested in Cuba on-shore since 1996, now holds four blocks exploration concession in Cuba	To explore and drill the fields that are in Cuban deep-waters	Economic	Against
<i>Repsol YPF (Spain) / Norsk Hydro (Norway)</i>	The two European companies are collaborating in six of the 59 deep-water blocks along Cuba’s maritime border with the United States. They were the first to prove high quality fields in Cuban deep-waters.	To explore and drill the fields that are in Cuban deep-waters	Economic	Against
<i>ONGC Videsh (India)</i>	They just acquired the right to explore on two blocks.	To explore and drill the fields that are in Cuban deep-waters	Economic	Not Clear
<i>Petronas (Malaysia)</i>	They have the concession rights to four blocks	To explore and drill the fields that are in Cuban deep-waters	Economic	Against

supplies, instruments, or equipment,” except where “restrictions would be permitted” under the Export Administration Act of 1979 or the International Emergency Economic Powers Act.

⁸Lewan Todd, “Will Cuban Oil Find Break U.S. Embargo?” *Washington Post*

<i>PDVSA (Venezuela)</i>	Venezuela's state oil monopoly, PDVSA, has signed a \$100 million deal to revamp Cuba's Cienfuegos refinery, a Russian relic from Cold-War days, and to increase oil storage capacity at the Port of Matanzas. They have the concession rights on four blocks	To explore and drill the fields that are in Cuban deep-waters. To restructure and train the Cuban oil sector	Economic/Political	Against
<i>Sinopec (China)</i>	The latest investor in Cuban oil fields with an option on 2 blocks	To explore and drill the fields that are in Cuban deep-waters.	Economic	Not Clear

Other than Norsk Hydro, all these companies lack the technical know-how to operate efficiently in deep-water fields. Furthermore there is a real opportunity cost in not being able to use the refinery capacity of the US. The only actor that does not have crystal clear position on the embargo is PDVSA (Venezuela), as Cuba is a natural political ally opposed to US hegemony in the region. A disruption of the embargo would probably trigger some changes in the actual socialist alliance and reduce the influence of PDVSA in Cuba. This is the reason why it must be admitted that PDVSA interests are ambiguous.

US private actors

<i>Actors</i>	<i>Description</i>	<i>Interests</i>	<i>Nature of interest</i>	<i>Position on embargo</i>
<i>US companies</i>	Exxon Mobil, Chevron, Halliburton are barred from the Cuban market, in 2001 Rice University said it could be worth up to \$3 Billion annually.	To obtain an oil exemption to the Helms-Burton Act and be part of the Cuban oil race. To sell services and equipment to the companies that are exploring in Cuba. To drill in US coastal deep waters (against 1981 moratorium).	Economic	Against (oil exemption)

<i>US oil industry lobby</i>	National Petrochemical and Refiners Association, represents 450 companies and lobbies for an end to the embargo. They also lobby against the 1981 moratorium on coastal drilling, that bars drilling within US deep-water fields.	To obtain an oil exemption of the Helms-Burton Act. To remove the 1981 moratorium on coastal drilling.	Economic	Against (oil exemption)
<i>Florida state lobby</i>	Lawmakers from the state are so adamantly opposed to drilling that they have bid to extend the national ban on drilling activity from 160 kilometers to as far as 402 kilometers offshore, encompassing the island of Cuba. They consider that oil spills — even routine toxic pollution from drilling — could pollute the Everglades and Florida's most economically important beaches and wreck the state's tourism industry.	To protect the tourism industry and bans the US companies and the foreign ones that are already operating in Cuba.	Economic/ Environmental	In favor
<i>US Cuban Diaspora lobby</i>	Cuban American National Foundation advocates that allowing U.S. companies to drill off Cuba would damage the ability to press the Cuban government on other issues, such as human rights. The highly influential Cuban-American voting lobby of south Florida is strongly opposed to any exemption to the embargo.	To fight any measure that may alleviate the efficiency of the embargo. To block all US investment in Cuba until the end of Castro's regime and to overthrow the PCC.	Economic/Political	In favor

Private US actors have very contradictory positions. On the one hand a strong industrial lobby backs up the economic interests of US oil companies and the dismantling

of the embargo. On the other hand a politically powerful interest group is strongly opposed to drilling in both Cuba and on the US coastline. However, if an obvious confluence of interests exists between the oil companies and the oil lobby, a great divergence in interests can be highlighted between the Florida state lobby and the Cuban diaspora. Both are against drilling in Cuba but for different reasons. *The Florida lobby seeks to protect the environment, while the Cuban Diaspora wants the perpetuation of the embargo to maintain pressure on Castro.* The first lobby is not adamantly in favor of the embargo; however it is strongly opposed to any drilling in the Florida deepwater for the sake of preserving economic interests linked to tourism. The Diaspora is harshly opposed to any form of cooperation with the Castro regime, therefore its main objective is the continuation of the embargo – in this case, opposition to the drilling is not the major goal of the group.

US Public actors:

<i>Actors</i>	<i>Description</i>	<i>Interests</i>	<i>Nature of interest</i>	<i>Position on embargo</i>
<i>US Senators pro-drilling in Cuba</i>	Bill on the exemption to oil services and equipment. Bill on opening coastal waters for natural gas development	To succeed in obtaining an exemption for oil. To use the vacuum created by this oil exemption to push for an end to the embargo. Indeed, some senators of the corn belt are pushing to have US agricultural companies entering the lucrative agricultural Cuban market.	Economic/Political	Against
<i>US Senators anti-drilling in Cuba</i>	Bill to bar the 1977 treaty renewal. Block renewal of the 1977 treaty and then deny foreign companies access to U.S. markets if they continued to drill in waters close to Cuba. Bill to impose sanctions on any person or company investing \$1million or more in Cuba's oil industry. Bill to deny US visas to the executives of foreign oil firms drilling in Cuban waters.	To prevent the US companies from investing in Cuba, to please the Cuban Diaspora lobby very powerful in South Florida. To prevent any risk of oil spills in the Coastal waters.	Economic/Political/ Environmental	In favor

The position of US senators with anti- and pro-drilling positions is poles apart. Each camp seems to be soundly anchored in its position and therefore there seems to be no room for negotiation. One can see that both the US public and private sectors are extremely divided in their interests. Compared to the other groups of actors analyzed, the US arena constitutes by far the most conflict-ridden environment.

NEGOTIATION AUDIENCE:

The audience chart presented below uses a method of analysis created by Weiss in his case study regarding negotiations held between GM and Toyota.⁹ The two negotiators at the table are not discussing in a static and closed environment. On the contrary, the course of the negotiation both affects and is influenced by several actors. The actors try to alter the negotiation in order to promote their own interest. As a result, the negotiating firms have to adapt themselves to this evolving and “aggressive context.” The International Negotiation Analysis is a very enlightening means by which one can encompass the complexity of this type of negotiation. By challenging the basic principle of Game Theory, this framework offers new capacities for analysis. Indeed, to explain the firm’s strategic adaptation, the mainstream Game Theory would need to take into account the *bounded rationality*¹⁰ of actors far more than it currently does¹¹. In the Game Theory, none of the actors have great difficulty acquiring useful information, processing it, and developing steady preferences and strategies. Transaction costs are low, and in this particular case both CUPET and the US companies benefit from “complete information” during the course of the negotiations. In addition to that, the actors have a sharp degree of *rationality*, which allows them to identify reasonably the logic at work.

However, the International Negotiation Framework considers uncertainty in negotiations, an assumption that radically changes the perception and the analysis. First and foremost, positions are determined by expectations about how others are likely to behave indeed, firms become aware of antagonistic positions only during the negotiation. Therefore they might change their initial positions and reshape a new strategy on the basis of their preferences. Second, due to partial information, issue complexity, and multidimensional domestic structures, the actors cannot evaluate whether their initial policy preferences are based on “correct” assessments of the adequacy of the US-Cuban political relations at hand. Thus, one must admit that new information can give rise to a change in basic strategic preferences.¹² It is crucial to define the different audience circles that are involved in the negotiations since they alter the definition of the interest at stake.

On the following graphic, one sees that the US political audience is overwhelmingly present in this particular context. In effect, in almost every audience circle

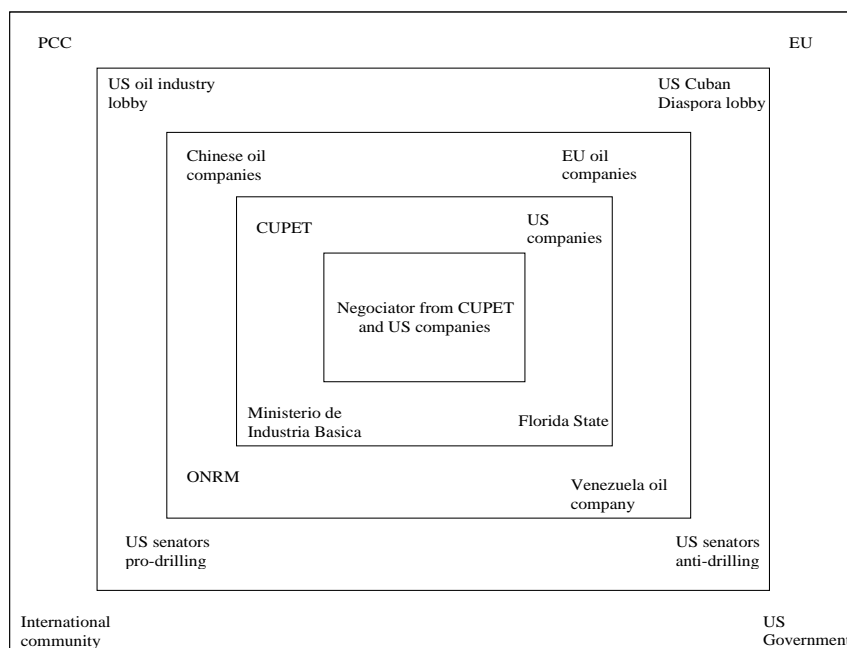
⁹ Saner, Raymond, *The Expert Negotiator*., p212

¹⁰ Tallberg Jonas, explains that “Once the unanticipated consequences are understood, those effects will thereafter be anticipated and the ramifications can be folded back into the organizational design. Unwanted costs will then be mitigated and unanticipated benefits will be enhanced”, “Delegation to Supranational Institutions: Why, How, and with What consequences” in “The politics of delegation”, p37

¹¹ Bounded rational agents experience limits in formulating and solving complex problems and in processing (receiving, storing, retrieving, transmitting) information

¹² James K. Sebenius, “International Negotiation Analysis”, in “International Negotiation : Analysis, Issues, Approaches”, Second edition, Victor A. Kremenjuk,

a US political or private actor is present. As a consequence, there is competition between the actors and especially in the US sphere. All the actors voicing their arguments are trying to push their own agenda. The negotiations between CUPET and US firms are troubled by a cacophony of divergent interests. Not only do these two actors need to negotiate with each other, but they also must deal with the requests and buffers emerging from the surrounding actors.



It is very unlikely that an agreement will be reached if the “spec-actors” opposed to it. Indeed, if a solution is to emerge there is strong evidence that it will come from US political arena.

Therefore, it is very interesting to focus on the US debate and to understand the positions of the different actors towards drilling in Cuba. The notion of a Zone Of Possible Agreement (ZOPA)¹³ is of utmost interest in analyzing the situation inside the US political arena.

The ZOPA is a spectrum of possible agreements that is anchored by the reservation price of the buyer on the one hand and the reservation price of the seller on the other hand. Each agreement along this line represents a particular repartition of the gain. Therefore, for a ZOPA to exist, the two parties need to find common interest in order to

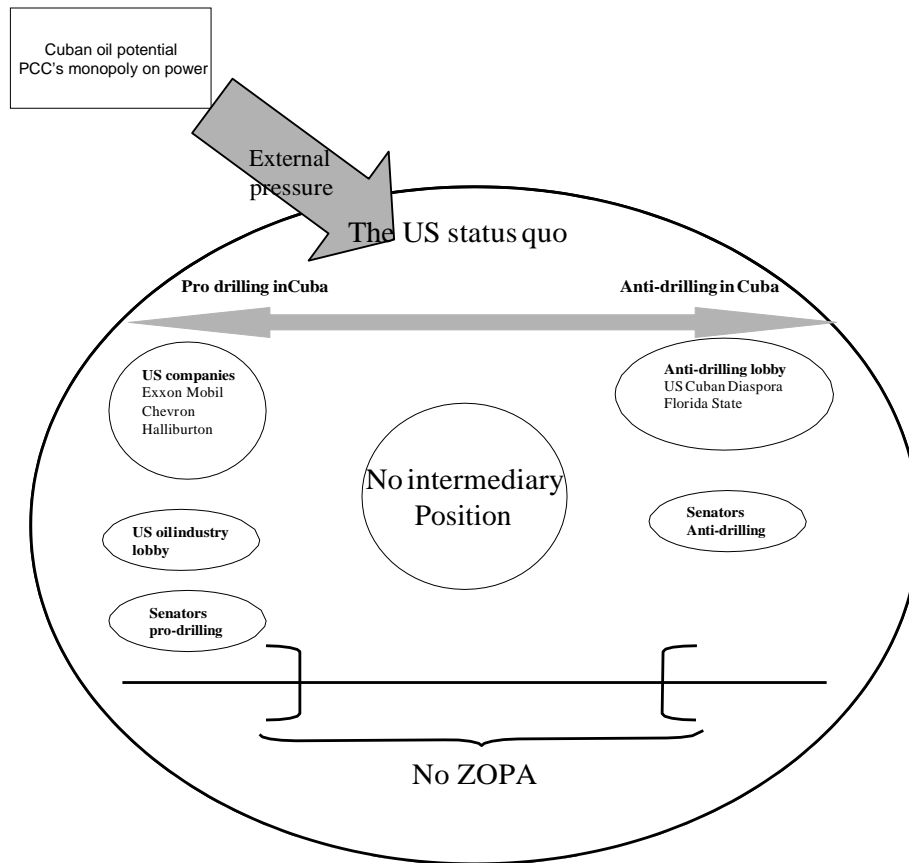
¹³ Saner, Raymond. *The Expert Negotiator-Strategy*. p42

reach an agreement.¹⁴ If they do not, there is nothing to share and thus no ZOPA. Considering the case of the US political arena on the issue of drilling in Cuba, it seems that there is no ZOPA. Indeed, the actors seem to have had no interest in finding a solution with the opposite camp. A striking conclusion that can be drawn from this US schematic is that no actor seems to have an intermediary position. The interests of both camps are poles apart, and as a consequence the status quo will prevail during negotiations.

The pressure, however, created by the discovery of oil in the Cuban North Basin and the impending death of Fidel Castro may force the two opposite camps to try to find an agreement. Indeed, the positions are embedded within a dynamic environment that is shaping and altering the debate. In fact, with China working with Cuba to drill almost on US soil, the negotiation is very likely to evolve in one way or another. Moreover, the succession of Fidel Castro may trigger some political changes in Cuba that will modify the actual US position. The pressure from Cuba is very likely to be the element that will modify the actual US status quo. Therefore, a scenario planning analysis may complement the actual understanding of the situation. Based on key uncertainties and looking at the consequence of the Cuban political transition, the second part of this analysis will focus on the probable scenarios that might create change amongst the US actors.

¹⁴ Saner Raymond, "The Expert Negotiator-Strategy, Tactics, Motivation, Behaviour, Leadership", p42

MAPPING THE US ARENA ON THE ZOPA



A SCENARIO ANALYSIS ON CUBAN OIL

15 years after the disruption of the USSR block, the PCC is faced with another great loss: the uninterrupted leadership of Fidel Castro. For many Cuban's Mr. Castro is the only leader they have known. He has been, to all extents and purposes, the manifestation of communism and leadership in Cuba. *His declining health over the past six months poses many difficult choices for the PCC leadership.* The PCC has attempted to keep the state of Castro's health secret and deal with the problem of succession very quietly. However, for the moment recent events have derailed this approach. With the leaking of information by a Spanish doctor concerning the gravity of Mr. Castro's health, this issue can no longer be dealt with secretively. It is unclear how the transfer of power will occur, despite the fact that Raul Castro, Fidel's brother, has been designated as his acting successor. Fidel Castro's charisma has masked and softened the difficult, at times forceful, measures taken to ensure

the PCC's position in Cuba. The people's reaction to his demise will clearly be a major factor in the future of the nation. Nonetheless, if the hope for a Cuban oil boom turns into reality the PCC will have the capacity and the resources to continue holding power and fuel their policy with the oil boom.

Critical uncertainties

Monopoly on power

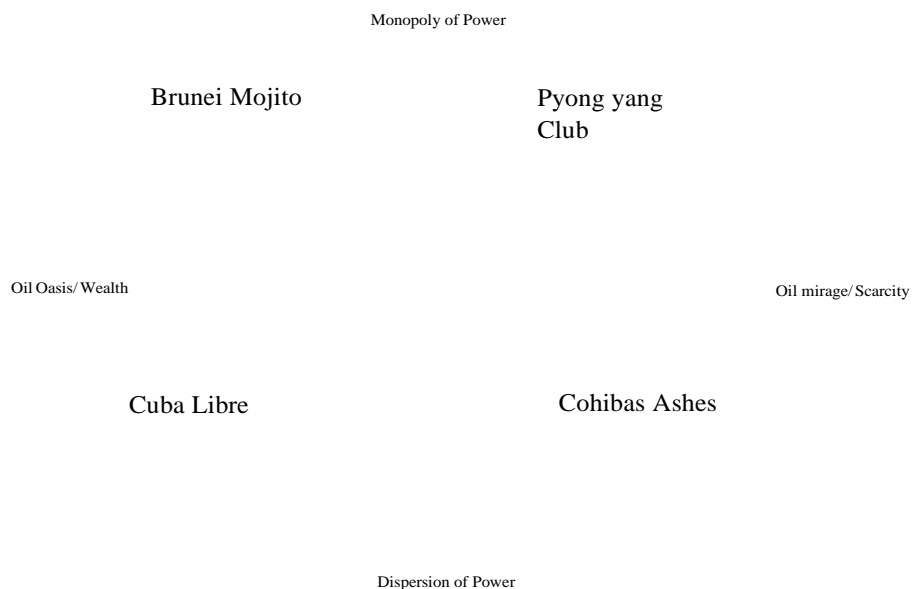
The party's ability to rule after Fidel Castro's death will depend greatly on its capacity to maintain its monopoly on power. Thus far, the PCC has managed to *monopolize power* in Cuba, shaped by two elements. First, the party leadership, especially Fidel Castro, has *asserted strong discipline within the PCC*. This has occurred through persuasion but also through the use of force when necessary. Regardless of the means used, the leader's voice has been uncontested and the party has seemingly remained a unified, monolithic unit. Equally, the PCC has managed to retain power over the Cuban population, leaving no room for dissident voices to arise. Second, *the PCC has controlled the political arena* by limiting opposition, incarcerating disruptive political agitators, publicizing the achievements of the Revolution and banning "imperialistic propaganda" from the Cuban-American media.

The dichotomy between *monopoly of power* and *dispersion of power* shapes the scenarios presented below. On the one hand *monopoly of power is, the party's ability to suppress competition which will determine the PCC's capacity to maintain its dominant position in Cuba*. *Dispersion of power*, on the other hand, will *oblige the party to compete for its dominant position*, rendering the PCC's future position uncertain.

Oil quantity and Accumulation of Wealth

Oil quantity has been chosen as the second structuring uncertainty. Provoked by the collapse of the USSR, *the resulting lack of resources has heavily shaped the PCC decisions*. Cuba, facing an unbearable scarcity of resources has been compelled to open its economy to foreign investors. Now, with the hope of consistent oil resources the PCC might be able to shift this again, retain power and deliver a vital economy. *Furthermore, the revolutionary ideology's loss of resonance among the youth increases the pressure on the PCC to deliver wealth and access to goods*. It is certain that the Party's survival is linked to its ability to deliver wealth and access to goods to the population. The PCC has succeeded in financing its politics by controlling a limited development of tourism. Moreover, finding a new, generous ally, such as Venezuela has been critical to eliminating energy shortages and blackouts. *Nevertheless, it has, at the same time, opened a Pandora's Box and exposed the Cubans to the dollar and an abundance of goods*. Although limited, these contacts with globalization trigger increasing demand for more comfort and more opportunity among a population tired of sacrifices and scarcity. The opposing relationship between Wealth and Scarcity impacts the four scenarios to be presented because the ability to deliver wealth and give access to goods will determine the PCC's ability to prevent social turmoil and remain in power. On the other hand, scarcity will continue agitating an increasingly unsatisfied population, and put aging infrastructures in deadlock situation.

AXES OF KEY UNCERTAINTIES



The key uncertainties create a two dimensional environment and map some possible scenarios thereupon. The left side of the graph represents a Cuba where oil discoveries have been confirmed by the exploration phases. Moreover, the PCC is able to capitalize on the boom and to deliver more wealth to its population. On the right side of the graph is a Cuba where oil resources are a mirage and where the PCC is unable to create an environment friendly enough to deliver the necessary wealth. On the upper part of the graph the PCC copes with the political transition and conserves its monopoly on power. Finally, on the bottom part of the graph the PCC is neither able to manage the political transition nor to retain power.

THE SCENARIOS

Brunei Mojito

In this scenario, the party overcomes its own confusion after the death of Fidel Castro and in a pragmatic manner approaches the social commitments and the exigencies of the economy –both in its private and public dimensions– through its relation with foreign capital and the global market. 10 years later, the oil fields will have attained the level of production expected and Cuba will have become a regional oil player. The US companies are now present thanks to an exemption for oil in the Helms-Burton Act.

Cuba Libre:

The Communist Party has not survived to the death of Fidel Castro. With a democratic transition, the US companies are now investing in the rich oil fields of Cuba and new investors rapidly follow with FDI flowing in from Spain others EU members and China.. The natural resources, (oil, cobalt, nickel, arable land) and tourism were of great appeal to the new investors. Nevertheless, this disruption of power goes hand in hand with an ever-growing dependence on foreign players.

Pyong Yang Club:

In this scenario the Communist Party is able to lead the country through the political transition, but oil hope has vanished since the oil fields explored are barely sustaining Cuba's own consumption. Therefore the PCC is unable to create wealth and, even less, to deliver it to the population. Therefore, a draconian political profile prevails within the government in order to control social unrest and a more defensive and 'realist' strategy towards the international arena. Now, more than ever, national security and strategic resources take priority over social welfare and economic development. The US Cuban Diaspora increases its call for US intervention to stop this oppressive regime.

Cohibas Ashes

The Communist Party is unable to retain power because competing factions within it are unable to suppress dissident voices. This is partly due to the fact that there is a scarcity of resources. Indeed the oil boom turns out to be a mirage and Cuba's oil fields are disappointing yesterday's enthusiastic investors. Political instability pushes the same investors away from Cuba. This dramatic economic situation translates into mounting social pressure. As a consequence prominent party officials from the Castro years suggest alternatives to the chaotic situation under Raul Castro. The party leadership can no longer monopolize power and there are competing factions with small pockets of influence in society and the armed forces, a situation which disperses power. Moreover, because of the inability of the PCC to impose its authority by force and deliver welfare to the people, a myriad of different actors emerge trying fill to the power vacuum left by Fidel's death. The result is confrontation, conflict, and chaos. The crisis gives the international community a chance to 'push' its own. The Cuban population is impoverished and divided over this conflict.

CONCLUSION

Cuban oil is at the center of a major political storm. Far from being static, the interest and strategic options of the different actors are influenced by the environment they are involved in. Some foreign companies are investing a great deal in the exploration phase with the strong belief in the value of vast potential resources residing in the North Cuban Basin. The PCC is trying to make the most of this enthusiastic rush on their resources without endangering its monopoly on power. Therefore, Cuba favors regulations or laws that encourage the ongoing operation of, or investment in, the oil industry. More than that CUPET is trying to dismantle the embargo and lure US oil companies that are already eager to invest in "the backyard of their garden." Indeed, the PCC tries to make the embargo unbearable for US firms, which are disqualified from the race, and push them to lobby for an exemption to the embargo on the oil industry. Nevertheless, the different scenarios show

that such a strategy will heavily depend on the true amount of Cuban oil reserves and on the ability of the PCC to retain power.

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MARKET ACCESS AND ANTI-TRUST LEGISLATION: THE MICROSOFT ANTI-TRUST CASE IN EUROPE UNDERSTANDING BUSINESSES DIPLOMACY TODAY

Federico Rostrán Chávez

ABSTRACT

The anti-trust case against Microsoft at the European Court of Justice reaches far beyond the interests of Microsoft and its investors. The outcome of this case will greatly impact software development and how the IT business is conducted now and in the future. This paper focuses primarily on the negotiation strategies undertaken by main parties in order to later frame the role of the European authority, leading to the development of possible negotiation-result scenarios.

The Microsoft case at the European Court of Justice presents an exciting opportunity to evaluate business diplomacy at its best: a private multinational company confronting its strongest competitors together with the ruling and impact of a supranational body that represents the interests of 25 nations.

INTRODUCTION

Microsoft is currently appealing a European Union (EU) ruling upholding it had violated European anti-trust laws¹. The company was fined 497 million euro, and ordered to share the details of its server Application Programming Interface (APIs). Microsoft has challenged the latter portion of this ruling on the grounds that it could allow other companies to distribute its technology. It asked the US government to intervene and join it in court against the EU's Competition Commission, and is lobbying other US businesses to support its argument that this could "adversely impact" the value of other US companies' trade secrets.

On February 2006, the ECIS group, an association of Microsoft rival companies filed a complaint against Microsoft, alleging that monopolistic practices continue. On March 10, the European Commission sent a letter to Microsoft establishing its preliminary position that Microsoft remains noncompliant with its obligations under the March 2004 Commission decision. It reminded the American company to disclose complete and accurate interface documentation, which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers.

This case reaches far beyond Microsoft (and its investors); it actually establishes a precedent across virtually all industries on either side of the Atlantic.

The participation of multiple actors, including the ECIS group, the trustees, the European Commission, and Microsoft business allies make this case a very complex one. Although not an official multi-lateral negotiation in strict terms, it involves many actors and various interests, pits business against government, and business against business.

This chapter focuses on the interests and positions primarily of Microsoft and its rivals, to later frame the role of the European authority and the possible participation of the US government in one of the foreseen negotiation results scenarios. Ultimately the goal is

¹ The events depicted in this chapter make references to stage of the case up to May 2005.

to analyze the negotiation strategies undertaken by the parties, and the impact this case might have on the future of competition cases in Europe, and the way IT business is conducted today.

THE CASE AT THE EUROPEAN COMMISSION

On December 1998, Sun Microsystems Inc., a company based in Palo Alto California USA, applied to the European Commission to initiate proceedings against Microsoft Corporation, a company based in Redmond, Washington, USA. Sun maintained that Microsoft enjoyed a dominant position as a supplier of operating systems for personal computers, and that by reserving to itself information for network computing, the so called work group operating systems needed to interoperate fully with Microsoft's PC operating system.²

At the initiative of the Competition Commissioner, the EU Commission sent a statement of objections to Microsoft for allegedly abusing its dominant position in the market for personal computer operating systems by leveraging this power into the market for server software, as argued by Sun Microsystems.

Following an extensive investigation into Microsoft's Windows 2000 operating system, the Commission identified that Microsoft may have an overwhelmingly dominant position in the market for personal computer operating systems and also a significant market share in the market for low-end server operating systems. It also informed Microsoft that it may have violated European anti-trust laws. The Commission also argued, in a supplementary Statement of Objections, that Microsoft was illegally tying its Media Player product with its operating systems.

Mario Monti, then Competition Commissioner stated "Server networks lie at the heart of the future of the Web and every effort must be made to prevent their monopolisation through illegal practices. The Commission also wants to see undistorted competition in the market for media players. These products will not only revolutionise the way people listen to music or watch videos but will also play an important role with a view to making Internet content and electronic commerce more attractive. The Commission is determined to ensure that the Internet remains a competitive marketplace to the benefit of innovation and consumers alike,"³ he said.

In March 2004, the Commission fined Microsoft 497 million euro and ordered it to change some of its business practices to give rivals a better chance to compete in the market. It required Microsoft to produce the version of Windows without the media player and to provide with necessary coding to competitors.

In response, Microsoft appealed the Commission's decision in May 2004 before the European Court of First Instance. The company also delivered technical documentation and alleged communications protocols. In 2005, it released versions of its operating systems without the embedded media player.

² The Commission of the European Communities. Commission Decision of 24.03.2003 relating to a proceeding under Article 82 of the EC Treaty [Case COMP/C-3/37.792 Microsoft] March 2004. Page 5. [copyright]. Online. Available: <<http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf>> 15 May 2005.

³ The Commission of the European Communities. Communication IP/01/1232. Commission initiates additional proceedings against Microsoft August 30, 2001. [copyright] Online. Available: <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1232|0|RAPID&lg=EN> 15 May 2005.

The same year, the Commission appointed Professor Neil Barrett as “Monitoring Trustee” to oversee compliance of the 2004 decision. In November, the Commission finds that Microsoft is still not in compliance.

The Commission issued a new Statement of Objections against Microsoft for its failure to comply with certain of obligations under the 2004 decision. The statement indicated that two reports from the Monitoring Trustee pointed out that the company had not provided complete and accurate specifications for interoperability information, the core issue of the case.

In January 2006, Microsoft announces that it will provide a source code reference license for the technologies covered by the Commission’s decision to any licensees in the European licensing program. In March, the company states that it will provide unlimited technical assistance to any licensees in the European licensing program. In the same months, members of the Commission are reported to have been visited by US diplomats concerned by the treatment of Microsoft in this case.

On April 24th the appeal to the Commission’s decision begins before the Court of First Instance in Luxembourg.

PRIMARY AND SECONDARY PARTIES

This section further develops the case’s parties and discusses the strategies employed, with special focus on Microsoft’s diplomatic corps.

European Commission

The European Commission represents and upholds the interests of Europe as a whole, and in this case until Microsoft appealed its ruling to the European Court of Justice (ECJ) it has been the highest authority representing the wider interests of European nations. It is independent of national governments.

Among its overall functions, it drafts proposals for new European laws, which it presents to the European Parliament and the Council. It manages the day-to-day business of implementing EU policies and spending EU funds. The Commission also keeps an eye out to see that everyone abides by the European treaties and laws. It can act against rule-breakers, taking them to the ECJ if necessary⁴.

Microsoft Corporation

The Microsoft Corporation is a software giant. The firm dominates the operating-systems market and such prominence has made it the target of numerous domestic and international lawsuits. The company manufactures, licenses, and supports a wide variety of software products for computing devices. Its turnover for the fiscal year ending June 2003 was US\$ 3.22 billion (3.07 billion euro) on which it earned net profits of US\$ 1.32 billion (1.26 billion euro). Microsoft employs 55,000 people around the world. Present in all European Economic Area countries (EEA), activities in this region are controlled by Microsoft Europe Middle East & Africa based in Paris. Microsoft is present in all countries within the EEA.⁵

⁴ European Union at a Glance. The European Commission. [copyright] Online. Available: <http://europa.eu/abc/panorama/howorganised/index_en.htm#commission> 15 May 2005.

⁵ Commission Decision of 24.03.2003. Page 4.

Sun Microsystems, Inc.

Sun Microsystems Inc. is primary plaintiff in this case. Sun provides network computing infrastructure solutions that comprise computer systems (hardware and software), network storage systems (hardware and software), support services and professional and educational services. Its turnover for the fiscal year July 2002 to June 2003 was US\$ 1.14 billion (1.09 billion euro). It suffered a net loss of US\$ 2.38 billion (2.23 billion euro). Sun employs approximately 36,100 people around the world and like Microsoft, it is present in all countries within the EEA.⁶

Secondary parties

Throughout the procedure a significant number of interests, comprised of major Microsoft competitors, as well as industrial associations, have been admitted as interested third parties. These are *inter alia* the Association for Competitive Technology (ACT), Time Warner Inc. (Time Warner, previously AOL Time Warner), the Computer & Communications Industry Association (the CCIA), the Computing Technology Industry Association (CompTIA), the Free Software Foundation Europe (FSF Europe), Lotus Corporation (Lotus), Novell Inc. (Novell), RealNetworks, Inc. (RealNetworks), and the Software & Information Industry Association (the SIIA). These interested third parties, and the plaintiff (Sun), have requested Microsoft to comment on its reply to the second Statement of Objections and on certain submissions made following the supplementary Statement of Objections.⁷

In contrast, several allies of Microsoft were not admitted to intervene in the case before a European Union court, dismissed as "mere think tanks."

The Court of First Instance in Luxembourg rejected applications by four different groups to intervene. This intervention would have bought Microsoft additional time. The International Intellectual Property Institute, the Institute for Policy Innovation and the Progress & Freedom Foundation, and the International Association of Microsoft Certified Partners, Inc., "are not active in any of the markets concerned ... nor do they carry out commercial activities,"⁸ the court said.

The European Court of Justice

Microsoft's appeal of the Commission's decision before the Court of First Instance in Luxembourg brings a new party to the case.

The European Court of Justice (ECJ) makes sure that EU law is interpreted and applied in the same manner in all EU countries. With one judge from each member nation it ensures that the law is equal for everyone. It monitors, for example, that national courts do not give different rulings on the same issue. The Court also makes sure that EU Member States and institutions do what the law requires them to do.

⁶ Commission Decision of 24.03.2003. Page 4.

⁷ Ibid Page 7.

⁸ "Court Rejects 'Mere Think Tanks' in Microsoft Case. (Court of First Instance does not allow the allies)" *eWeek*, Ziff Davis Media Inc. Dec 16, 2005 [copyright] Online. Available: <http://www.accessmylibrary.com/coms2/summary_0286-12664501_ITM> 7 April 2007.

The United States Government

Another party brought to the case recently by Microsoft is the United States (US) government. Microsoft has complained that it has been denied the right to a fair defense, and accused the Commission of collaborating with its rivals, as well as denying it access to what it contends are vital documents necessary for preparation of its defense.

The US has responded to this allegation by urging the European Commission to be fair to the company. US diplomats visited the offices of three European commissioners: Jonathan Todd, the spokesman for the Competition Commissioner, Charlie McCreevy, Internal Market Commissioner, and Gunter Verheugen, Vice President of the Commission, according to news accounts, confirmed by EU representatives.⁹

THE DIPLOMATIC OFFENSIVE

This case, which is not the first one ever faced by the Microsoft Corporation, has put high pressure on the company. Its outcome might have a long-lasting effect on the way the company operates, engages in business, and develops its products. In order to protect its interests the company has put in place a strategy and series tactics to be evaluated further on.

The IT giant has mobilized its ‘corps’ of business diplomats composed of international lawyers, advisors, negotiators, and international media specialists to put the company in the best possible position before the EU Commission, its competitors and their allies.

Microsoft knows that the availability of this array of specialists is crucial to its success and has proven effective in other cases, learning from other giants such as Coca-Cola. “Being without in-house competence in business diplomacy, Coca-Cola Inc. missed out on the opportunity to respond in time to the request for clarification and remedial action by various NGOs ranging from consumer protection groups, journalists, political activists to concerned parents in Belgium.”¹⁰

Alliances

Microsoft’s competitors and opponent groups have created a coalition against Microsoft, and Microsoft on its side has tried to gain support from the US government. “The most important instrument that the negotiator has at his disposal in such a setting is to form alliances,”¹¹ and that is precisely what Microsoft has tried to do by reaching out to the United States government who has tactfully responded, so far. The probably future engagement of the United States in the case might have worldwide repercussions, bringing the case to another, even more complex series of negotiations, which could include the WTO.

⁹ Meller, Paul. “U.S. Asks European Union to Be Fair in Microsoft Case.” *The New York Times*. March 31, 2006. [copyright] Online. Available: <http://www.nytimes.com/2006/03/31/business/worldbusiness/31soft.html?ei=5088&en=ff316e2e5a416a24&ex=1301461200&partner=rssnyt&emc=rss&pagewanted=print> 15 May 2005.

¹⁰ Saner, Raymond. *The Expert Negotiator: Strategy, Tactics, Motivation, Behaviour, Leadership*. (2nd Edition. Leiden, The Netherlands: Martinus Nijhoff Publishers, 2005.) Page 225

¹¹ Ibid. p 227

STRATEGY AND TACTICS

Microsoft seems to have adopted a stalling executed with a combination of tactics. First the company is resolute to cooperate with the Commission to identify a solution to the conflict. Then, the company avoids bowing to the Commission's decision by only partially complying, and arguing that it is in full compliance, and finally it confronts the Commission's decision by appealing to the Court of First Instance transferring the case from Brussels to Luxemburg. Microsoft is dragging out this case and delaying the application of fines and mandates by the Commission.

Some could argue that Microsoft has been falsely compromising by affirming that it will provide the requested information when it has only provided seemingly useless or incomprehensible information to interested parties. Whether this is true or not, everything indicates that Microsoft Corporation is actually resolved not to let go of its position, perhaps because by doing so it will be risking too much of its business. In an internal Microsoft communication attributed to Bill Gates, President of Microsoft Corporation, and presented to the Commission by Sun Microsystems, those sensitivities seem to be evidenced: "The Windows API is so broad, so deep, and so functional that most ISVs would be crazy not to use it. And it is so deeply embedded in the source code of many Windows apps that there is a huge switching cost to using a different operating system instead...In short, without this exclusive franchise called the Windows API, we would have been dead a long time ago."¹²

In other words, the comparative advantage of Microsoft as almost the sole worldwide operative system provider would be phased out as new, fully compatible operating systems come to the market.

On the plaintiff and third parties' side, the strategy is more straightforward. It is at once confrontational and cooperative, providing throughout the process ample documentation with firms' sustaining their position.

Public Opinion

Public opinion plays an important role in this case, and it certainly has impacted the performance of the actors. The European Commission has based its decisions not only on the fair competition argument, but also on the great interest of consumers. An argument presented by Microsoft states that its practices do not provide the company with an unfair advantage over its competitors, but that on the contrary its practices benefit consumers. "A skilled negotiator can however make a virtue out of necessity and actually use public opinion as a tactical instrument to further his negotiation strategy."¹³

Besides mobilizing its 'diplomatic corps' Microsoft has put in place an important media strategy aiming to counterattack any negative image or perception of wrongdoing the consumer might have. "Whether the public is involved physically or only vicariously through the (occasional) presence of the press, it plays a number of roles in many negotiations...An important criterion here is the degree to which the public...perceives itself to be affected by the outcome of the talks."¹⁴

¹² Commission Decision of 24.03.2003. Page 126.

¹³ Saner, Page 198.

¹⁴ Saner, Page 197.

Interests Groups

This case includes the participation of different interest groups, some of them admitted by the EU Commission as third parties, such as the Association for Competitive Technology (ACT), the Computing Technology Industry Association (compTIA) and the Free Software Foundation Europe (FSF Europe).

“Most negotiations and decisions on the part of companies, public authorities, associations or states, and even of private individuals, have an impact to some degree on other people...to ensure that their interests are sufficiently taken into account...”¹⁵

FORESEEN NEGOTIATION RESULTS

Microsoft Winning

In this scenario the ECJ would find Microsoft in compliance with the European Commission decision, after finding as satisfactory the remedies implanted to the software and the information provided to the competitors sufficient for full interoperability to allow fair competition.

For its decision the ECJ would rely heavily on the same technical expertise used by the European Commission, probably in this case the Monitoring Trustee, Professor Neil Barrett. In this case, the Commission will have previously found that Microsoft failed to comply with the March 2004 decision on the question of the completeness and accuracy of the technical documentation of the communication protocols. Therefore, to achieve a favourable decision by the Court of First Instance in Luxembourg, after its April 24, 2006 appeal, Microsoft will have to provide further, more comprehensive information concerning its operating system coding in order for its competitors to develop fully compatible systems.

This seems to be a very difficult option for Microsoft, and compliance with this requirement will depend on the willingness of Microsoft to share its captive market. On not complying with the Commission’s requirement, the ECJ will have no other option but to reject Microsoft’s appeal. This is because Microsoft would have been found holding a ‘dominant position’ in the market (contemplated on Article 82 of the treaty). Such a position is defined by the Court of Justice itself as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately its consumers.”¹⁶

The ECJ evidently cannot rule against its own prior judgment. Without significant cooperation by Microsoft, the decision would be not in favour of Microsoft. Furthermore, the Court of Justice in its decisions also weighs political considerations. Ruling in favour of Microsoft without a significant cooperation from the company would debilitate the role of the Competition Commissioner to pursue other cases.

¹⁵ Saner, R. page 193.

¹⁶ Commission Decision of 24.03.2003. Page 118.

Microsoft Losing

In this scenario Microsoft's appeal to the ECJ is not upheld, meaning that the company will have to fully comply with the 2004 European Commission decision. The Commission previously stated that Microsoft did not carry out its obligation to disclose sufficient interface information about its PC operating system, affirming that in the past Microsoft gave information only on a partial and discriminatory basis to some of its competitors, refusing to supply such vital information to others, such as Sun Microsystems.

The Commission believes that without such information, alternative server software would be denied a level playing field, as it would be artificially deprived of the opportunity to compete with Microsoft's products on a 'technical merit basis.' Therefore, a Court of Justice ruling against Microsoft would mean that the firm would have to fully share, under the Monitor Trustee's consideration, sufficient information about its coding with its competitors.

This dramatic change would have enormous impact on the operation of the company. "The outcome of this case is critical not only for Microsoft, but for future innovation in our industry. Companies need to have confidence they won't be forced to hand over their valuable intellectual property to their competitors. In addition, companies need to have confidence they can develop new products with the features their customers want," said Brad Smith Microsoft General Counsel on April 28, 2006, following the conclusion of the company's appeal before the Court. In other words such a scenario would have an impact on the future operations of Microsoft, which is the most relevant aspect of the case.

To a great extent, this case can also impact the pre-eminence currently enjoyed by the firm on the operating system market. Given that such a ruling would have a dramatic impact on the company's operation, it would most likely appeal to the US government, arguing that this ruling is detrimental to intellectual property rights and US business interests as a whole. In this case, if the US government finds Microsoft's arguments sufficiently persuasive, and interprets the EU's resolution as a clear threat to its business (and national economic) interests, it might undertake important steps to prevent such a loss. This could include an appeal as a country to international organisations – the World Trade Organisation (WTO) in this case. Such a decision might depend on political considerations by the concerned US authorities, and the possibility of identifying a politically negotiated solution between the United States and the European Union, before appealing to the WTO.

CONCLUSIONS

This is a clear example of the relevance of business diplomats in today's business world. The availability of in-house expertise in multinational companies can make the difference in complex situations such as the one depicted here.

Microsoft's strategy of delay coupled with a cooperation-avoidance-confrontation tactics, reflect the expertise acquired by its team and diligent and sensible preparation of its advisers.

The impact that the ECJ's decision might have on the future of the global IT business reflects as well the complexity of international relations, where governments, business sectors, interest groups, and the public opinion all play an important role in the process and the outcome of such negotiations.

Of the direct impact the results of this case might have, we can say that the ruling is intended not only as a remedy to previous alleged monopolistic practices by Microsoft, but

also as a means to promote more competition and greater choices to consumers in Europe and ultimately worldwide.

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MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS (AUSTRALIA) V. THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION & THE UN SPECIAL ENVOY ON BEHALF OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

Rachel Stein-Holmes

ABSTRACT

Debate surrounding Australia's mandatory and indefinite detention of asylum seekers is currently prominent in both national and international public discourse. Questions of legality, necessity and justice are consistently raised in relation to Australia's immigration detention policies.

This paper examines the positions of two key actors in the debate between the Australian government, represented by the Department of Immigration and Multicultural Affairs (DIMIA), and the Australian Human Rights and Equal Opportunity Commission (HREOC). HREOC will be supported in the negotiations by the UN Special Envoy on behalf of the High Commissioner for Human Rights. Background information on the issue will be presented, followed by an analysis of both sides' perspectives and their respective negotiation strategies.

BACKGROUND TO THE DEBATE

Australia has a system of mandatory and indefinite immigration detention. The legal basis for immigration detention under national law is the *Migration Act 1958*, under which immigration detention is required of all 'unlawful non-citizens.' This includes all those who have arrived in Australia without a visa, arrived without an acceptable visa or travel document, overstayed their visas or had their visas cancelled as a result of a breach. Unless they are granted permission to remain in Australia, these people must be removed as soon as it is practicable.

The effect of this law is that Australia currently has six operational immigration detention centres (IDCs). IDCs operate similarly to prisons, with high razor wire fences and restricted access. Australia also has a number of community detention facilities to house families with children, those with special needs, and those spending a short time in detention.

As of 20 April 2007, there were 498 people in immigration detention in Australia, including 78 in community detention (39 of whom are children). Of the 498, 196 have been detained for less than 6 months and the remaining 302 have been detained for more than 6 months.¹

The use of IDCs has been the focus of international scrutiny from human rights bodies such as the UN High Commissioner for Human Rights, and has been the source of intense public debate in Australia for several years.

¹ DIMIA "Detention Statistics Summary." Detention and Offshore Services Division. 20 April 2007.

GENERAL INFORMATION ON THE NEGOTIATIONS

The *legal perspective* of international negotiations will be used to examine a hypothetical negotiation regarding reforms to Australia's immigration detention system. The legal perspective is useful in this case, as the legal aspects are all-pervasive: many of the issues centre on whether the immigration detention centers are legal under international human rights and refugee laws and standards. The issues also extend to the legal responsibility of the government regarding immigration, and how it can best uphold its obligations.

As discussed, the negotiations will be between DIMIA, HREOC and the UN Special Envoy on behalf of the High Commissioner for Human Rights. This negotiation has not taken place before but is plausible given the involvement of the actors and their previous dialogue and conciliation approaches with respect to this topic. This negotiation will be considered *bilateral*, as HREOC and the UN Special Envoy will negotiate as one team (the 'human rights team') with identical goals and purposes. The reason for including these two organisations as one team is that they are strongly aligned and their partnership will deepen the knowledge and expertise of national and international human rights law and policy. They also have no competing interests. This process will be an *integrative bargaining process*, meaning that the parties are willing to negotiate a compromise on some issues in order to find a win-win solution for both parties. A number of issues will be negotiated at the same time in this process, and the intention is that both sides will feel they have gained some ground, despite compromises they may have made.

DIMIA's perspective on immigration detention

DIMIA believes the Australia's immigration detention policy is integral to the protection of Australia's borders. It argues that immigration detention is an important method of deterrence, whereby asylum seekers and those considering breaching their visa conditions will be less likely to come to Australia or abscond, respectively, if they consider the likelihood of indefinite detention. DIMIA uses the *Migration Act 1958* as the legal basis for detention.

DIMIA has, however, already been forced to concede certain aspects of its detention policy. It is worth noting that severe public backlash against the detention of children plus damaging findings against the government by HREOC of human rights abuses against children in detention in 2004, recently forced the government to change its policy on children in immigration detention. Amendments to the *Migration Act* in June 2005 stipulated that families with children are now to be placed in the community, under flexible community detention arrangements, with conditions set to meet their individual circumstances. Immigration detention is only to be used as a measure of last resort. This concession shows the delicacy of this issue and the effect that political and public pressure can have on DIMIA.

The human rights team's perspective on immigration detention

HREOC and the UN special Envoy strongly oppose the government's use of immigration detention centres. They argue that as a party to the International Convention on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC) and the Refugee Convention, Australia has committed to uphold certain human rights provisions. While these conventions have not been directly incorporated in their entirety into domestic

law, many of their provisions are reflected in domestic legislation.² For example, under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), HREOC is empowered to examine commonwealth actions and legislation to determine their consistency with human rights standards as defined by the CRC and ICCPR. Thus, the human rights team argues, Australia has a legal obligation to uphold international human rights standards.

More specifically, the human rights team disputes immigration detention on a number of grounds: firstly, they dispute their use of *indefinite* detention. They argue that under Article 9 of the International Convention on Civil and Political Rights (ICCPR) and Article 37(b) of the UN Convention on the Rights of the Child (CRC) – both ratified by Australia – arbitrary detention is illegal. In particular, indefinite detention prevents detainees from enjoying their right to be treated with conditions of humanity and dignity.

Second, the human rights team disputes the lack of sufficient judicial review of detention in Australia. International law requires remedies before courts for victims of unlawful detention. The government holds that under common law there are various avenues available to challenge the lawfulness of immigration detention. The UN, however, disputes their effectiveness in ordinary immigration cases.³

Third, the human rights team argues that the human rights conditions in immigration detention are inhumane and degrading, breaching both the ICCPR and CRC. Poor conditions include: overcrowding, failure to separate men and women, inadequate educational infrastructure, failure to separate criminal deportees from asylum seekers, inadequate heating and cooling, unsanitary and inadequate toilet facilities, inadequate facilities and access for detainees with disabilities, overly intrusive surveillance methods and inadequate access to prayer rooms.

Finally, the human rights team maintains that detention solely as a means to deterrence is unacceptable and is a violation of the Refugee Convention and international human rights law.⁴

POSSIBLE SOLUTIONS TO THE CONFLICT

A negotiation between DIMIA and the human rights team on immigration detention reform is one way to address this conflict. It is plausible that in the near future such a negotiation would take place, possibly in response new waves of political and public pressure for reform following for example, a high profile incident in the IDCs or a damaging report by a respected international organisation such as the UN.

DIMIA's strategy

DIMIA's main motivation in negotiating with the human rights team would be to develop a more human rights based approach to immigration detention, in accordance with increasing public and political demand. The government's position would be *strong* – ultimately

² HREOC A Last Resort? National Inquiry into Children in Immigration Detention. 2004: Sydney. HEROC

³ UN Working Group on Arbitrary Detention. "Civil and Political Rights, Including the Question of Torture and Detention: Visit to Australia". Economic and Social Council E/CN.4/2003/8/Add.2. October 2002

⁴ HREOC "Submission to the Parliamentary Standing Committee on Public Works Regarding Villawood Immigration Detention Centre Redevelopment, Sydney." March 2006: Sydney

decisions of reform rest with it. International law cannot be invoked against DIMIA in this case, as its actions are within the mandate of national laws. Using *integrative bargaining*, it is plausible that DIMIA would take the position that the system of immigration detention will remain but within it the government could compromise on certain aspects of immigration detention that are most objectionable to human rights and public pressure groups, such as the conditions.

Best scenario for DIMIA in the negotiations:

- Some form of immigration detention must remain in place. Immigration detention is essential for border protection and it would be a major political defeat for the government to withdraw on this point.

Negotiable points:

- Australia needs to preserve its international reputation in the face of increasing international pressure. If pressed, DIMIA could negotiate on the more flexible aspects of its detention policy, such as detention conditions and processing times.
- At the most extreme, the government may be willing to let children into the community with their families, as opposed to being in alternative detention arrangements. However, given the political consequences of having some adults released in the community, this would be a poor outcome for the government that it would likely try to avoid.

DIMIA's strategy table in relation to the human rights team

<i>Assertiveness</i>	<i>Cooperativeness</i>	<i>Response</i>	<i>Possible Tactics</i>
High Final decisions rest with the government	Low-mid May need HR team's advice and support, but DIMIA has upperhand.	Competition to compromise	Maintain firm stance on existence of IDCs but then concede on procedural issues within the framework of IDCs

The human rights team's strategy:

The human rights team is in a significantly weaker bargaining position. It does have international pressure and support on its side, as well as international legal standards and guidelines, but ultimately the decision rests with the government as long as its actions remain within the boundary of national law. *Integrative bargaining* would be useful for the human rights team, as it will enable them to at least gain some ground on reforming the system. The human rights team must be modest in their intentions though their ultimate aim of dismantling the detention system is very unlikely to be fulfilled.

Best scenario for the human rights team:

- The *Migration Act* should be amended so that mandatory detention is not required. Following this amendment, all IDCs should be closed.
- IDCs should be replaced by an *alternative to detention*, as opposed to an *alternative form of detention*. For example, persons able to provide credible guarantees upon arrival to Australia (e.g. relatives with Australian nationality or sponsorship by benevolent organisations) should be released and received in the community while waiting for a decision. In the case of a negative decision, the person should be detained pending removal only if he/she refuses to leave voluntarily.

Negotiable points:

- If IDCs remain operational, the asylum and visa application processes must be significantly changed. A maximum time in detention of 90 days should be imposed.⁵ After this time, a bridging visa should be issued and the applicant should be lodged with family or friends, or in an open reception centre.
- Regular reviews of detained applicants' circumstances are important.
- The conditions in IDCs must be improved. The centres should be less like jails and the government should insure that centers meet the individual needs of each detainee, taking into account his or her history and experiences, culture, age, gender and religious and linguistic identity.⁶
- Even if the IDCs remain open, all children must be let into the community with their families. Under alternative forms of detention, DIMIA still retains full control and responsibility for everything that happens to children.⁷

The human rights team's strategy table in relation to DIMIA

<i>Assertiveness</i>	<i>Cooperativeness</i>	<i>Response</i>	<i>Possible Tactics</i>
Low	Mid Wants to find a solution but will not withdraw on certain fundamental issues	Compromise	Aim high initially: abolition of IDCs, but then realistically try to agree on conditions of detention and processing that can be improved. The human rights team will have to be politically sensitive and careful in its actions, given its position as a federal

⁵ This would bring Australia in line with international practice. Sweden, for examples, processes asylum seekers in 47 days on average.

⁶ HREOC "Submission to the Parliamentary Standing Committee on Public Works Regarding Villawood Immigration Detention Centre Redevelopment, Sydney." March 2006: Sydney

⁷ HREOC *A Last Resort? National Inquiry into Children in Immigration Detention*. 2004: Sydney.
HEROC

			agency that is funded by the federal government.
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FUTURE FORECAST

Immigration detention in some form is likely to remain in Australia for the foreseeable future. As the hypothetical negotiations showed, DIMIA is acting within its powers under national law and the government is in a strong position to make almost unilateral decisions regarding immigration policy. Significant amendments to the *Migration Act* that would abolish immigration detention are therefore unlikely, given that they would require political will and support on the part of the government.

However, it is also foreseeable that reforms may be made to the existing detention system that could bring Australia closer to the international human rights standards to which it has voluntarily committed under the ICCPR, CRC and Refugee Convention. As an active member of the international community, the government has a clear interest to avoid mounting international disdain and pressure. As a political entity, the government also has an interest in maintaining a good record on human rights and social policy. Ultimately the issue will come down to political will: if the Australian public gets distressed and mobilised to demand change, the government may feel concern about its future governability, forcing it to reform. In such a case, entities such as HREOC and the UN would be well placed to direct the government towards more equitable immigration policies. To date, however, the government remains in a position of power, and major reform of Australia's detention system in the foreseeable future appears doubtful.

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THE BANANA TRADE DISPUTE (FROM 2005) AND NEGOTIATION STRATEGIES

Marie Sudreau

ABSTRACT

In March 2007, Ecuador secured a WTO panel investigation into the European Union Banana tariff. Ecuador's behaviour marks the re-opening of an old dispute, which has been on going for the past decade about trade preferential treatments granted by the EU to ACP (Africa, Caribbean, Pacific) banana producers. Initially started by US giant banana exporters such as Chiquita (United Brands), the dispute had found an apparent end when the EU accepted to grant exporting licences to US firms and to adopt a single tariff for bananas by 2006, whilst also temporarily maintaining the quota duty free system for ACP banana producers. Since then, the single tariff rate has been in discussions and was finally established at 176 euro per tonne of imported bananas by the EU under the watch of a WTO arbitrator. This tariff is in force since 1 January 2006 and remains subject to protests by some Latin American (L.A.) banana producers led by Ecuador, which argue that the tariff is too high and that the EU banana regime is unfair to L.A. banana producing countries because it discriminates against them in favour of ACP countries, thereby conflicting with WTO non discrimination rules. To this statement, the EU replied on numerous occasions that since January 2006, the exports of dollar bananas¹ grew by 10,7%, that only Ecuador registered a fall of 3,6% and that, therefore, the tariff could not be that high². This chapter attempts to analyse the negotiation strategies available to each party to the dispute and their implications. In order to do so, it is important to first identify the interest of the parties and define their positions. Second, possible negotiation strategies, tactics and alternatives to negotiations are analysed in the search for an optimum solution.

THE BACKGROUND

For many years the EU has maintained a banana import regime under the Lomé Convention that sought to provide favourable terms of trade to former colonies of EU countries (mainly France, Spain and the UK).

These former colonies African, Caribbean and Pacific (ACP) nations have been given preferential access to the European banana market through a tariff system as many of them, whilst being heavily reliant on banana exports, find it difficult to compete with cheaper bananas cultivated in Latin America (LA) by multinational companies such as Chiquita (United Brands) Del Monte and Dole.

In 1993, following the implementation of the Single European Act and despite Germany's resistance, the EU implemented the 'European Banana Regime' which placed quotas on imports of bananas from countries not included in its trade preference agreement. This gave rise to discontent on the part of both Latin American producers and US multinationals. Following the US request for a WTO panel to investigate the legitimacy of the European banana regime, in 1999 the WTO maintained that this regime was

¹ 'Dollar banana' is the term used to describe US firms' bananas, which are produced in Latin America but are sold in dollars.

² Press Report. FreshPlaza.com March 23rd 2007. www.freshplaza.com/2007/0323/2_jm_banana_exports.html

incompatible with the WTO rules and allowed the US to impose sanctions on the EU. A compromise was found between the EU and the US in April 2001 when the EU accepted to give import licenses to US companies like Chiquita until 2006 when a single tariff for bananas would have to be adopted.³ Under this agreement the ACP countries would remain protected by quotas until 2008.⁴ Ecuador disagreed with the new single tariff system⁵ devised by the EU and filed a complaint with the WTO, demanding that a Panel be established to investigate the system's legality, claiming that it was discriminatory in favour of ACP countries. Colombia supported Ecuador's claim.

THE STAKES OF THE CONFLICT

The EU consumes almost 40% of the world's bananas. The supply of this market is shared by Latin American producers, EU producers (mainly Greece, Portugal, Martinique and Guadeloupe) and ACP producers (former French, British and Spanish colonies). The Latin American producers have about 70% of the EU market whilst the ACP countries have a 17% market share and EU countries around 13%.⁶

Overall, the banana trade accounts for 0,3% of the transatlantic trade, but it is vital for many small economies, particularly those of Latin America and ACP countries. In addition, the EU quota regime could have been replaced by subsidies thereby avoiding a WTO rules infringement.⁷

THE ACTORS AND THEIR INTERESTS

The number of actors involved in this dispute impacts the evolution of the conflict. Their diverging interests were the source of ongoing confrontations at several levels including the political and economic.

The US government against the EU

The EU and the US are both members of the WTO and as such, are bound by the principle of Most Favoured Nations, which maintains that if one of the two grants a preferential agreement to a third country, or a group of countries as would be the case with the ACP, no other WTO member can be refused the same advantages granted by this preferential treatment. Although an enabling clause contained in the GATT allows developed countries to discriminate in favour of developing countries, it does not allow discrimination between different groups of developing countries. Hence, by restricting this preferential treatment to the ACP countries (and not extending it to L.A. producers), the EU has been in non-compliance with WTO rules and the US was quick to impose trade sanctions on the EU on the basis of unfair trade measures during the period between 1998 and 2001. With the flat tariff system set up by the EU in 2006, this argument against the EU is no longer available on the grounds that the same tariff is imposed on everyone. However, first, the ACP

³ www.foei.org/trade/activistguide/nanaimps.htm

⁴ Under the Doha waiver (WT/L/607 Add. 1-9)

⁵ New tariff system in place since January 2006 entails a Euro 176 tariff per tonne with 750 000 duty free quota on bananas from ACP countries beyond which the standard tariff applies.

⁶ Ibid (2).

⁷ Webber, D. and Cadot, O. (2002) 'Banana splits: policy process, particularistic interests, political capture, and money in transatlantic trade politics', *Business and Politics* 4: 109.

countries still benefit from a WTO waiver⁸ until 2008 and, second, the tariff level itself remains subject to criticism. In the new dispute,⁹ the US is only a third party supporting Ecuador's claim. This shows a change in its intention to be at the fore front of the battle against the EU.

US multinationals against EU multinationals

Chiquita and Dole are the Multi-National Corporations (MNCs) most concerned with the EU tariffs. In 2001, Chiquita obtained an agreement allowing it to export bananas into the EU through import licenses distributed on the past trade. From the beginning of the dispute in 1993, Dole had chosen to buy out numerous traders in ACP countries in order to benefit from the special conditions granted to them by the EU. As a result, when the regulation was passed Dole continued to make a profit while Chiquita saw its market share crumble and began making losses.¹⁰ Chiquita started to adopt the same strategy after the 2001 agreement. In the dispute started by Ecuador in 2006, US firms were not apparently involved.

It has been argued that companies like Geest (British) and Fyffes (Irish) were also looking to break the power of US multinationals and took advantage of the quota/tariff 1993 banana regime to further their interests.¹¹ (The EU banana buyers were benefiting from the differential between the high prices that were guaranteed by the regulation and the lower prices that they could negotiate with their African, Pacific and Caribbean suppliers.) However this seems to bear no weight on the current situation since there is no evidence of an attempt by those firms to influence the EU banana regime in any way.

Latin American producers and growers against ACP growers.

Latin American producers, headed by Ecuador and Columbia are now more involved in the battle than ever before, primarily because the US is no longer on the front line defending its interests. Companies such as Noboa in Ecuador have a high stake in the industry, as it constitutes one of the country's most important sources of employment and income. Hence, it is not surprising that even after the 2001 agreement, Ecuador, which was not taken into account by the import license arrangement granted to the US, urged the EU to change its policy as well. The battle continues today with the new tariff system devised by the EU, which L.A. producers deem unfair because it is allegedly too high and, thus, is perceived as discriminatory. It is interesting to note that the L.A. producers often mix two different claims. The first is that the EU tariff is too high. The second is that the ACP preferential system is against WTO rules of non-discrimination. It seems as although the WTO arbitrator agreed on the current single tariff, L.A. countries relied on the latter claim in order to attack the EU banana tariff regime under WTO rules. Indeed, the WTO is currently reviewing a claim introduced by Ecuador against the EU tariff system under Article 21.5 of the Dispute Settlement Unit (DSU) and Article XXII of the GATT 1994.

⁸ This waiver allows them to export duty free bananas in accordance with the applicable quota.

⁹ The "new dispute" refers to that started by Ecuador and Colombia in 2005 with respect to the flat tariff devised by the EU and in force from January 1st 2006.

¹⁰ Ibid (6).

¹¹ P. Sutton (1997), "The Banana Regime of the European Union, the Caribbean and Latin American" *Journal of Interamerican Studies and World Affairs*, Vol 39, No 2 (summer 1997) pp5-36

The ACP producers will lose the benefit of the quota system arranged under the 2001 Cotonou agreements, which granted them waiver from the WTO quota rules until in 2008. Hence, unless the agreement is renegotiated,¹² these countries face running into future financial difficulties. At the moment, they benefit from a duty-free regime for a quota of exports under 750 000 tonnes, above which they have to pay a 176 euro flat tariff rate recently imposed by the EU in agreement with a WTO arbitrator. The ACP producers are therefore interested in maintaining this system as long as possible or, in finding a new system that would promote economic improvement.

THE POSITION OF THE PARTIES (SWOT ANALYSIS)

	<i>Strengths</i>	<i>Weaknesses</i>	<i>Opportunities</i>	<i>Threats</i>
Ecuador and other Latin American Nations	<p>Low bargaining power is strengthened by the fact that they produce 60% of the bananas imported in the EU. Hence without their contribution, the price of bananas would increase dramatically. Reducing production is unlikely as these countries rely on the banana trade as a source of revenue. Furthermore, LA countries have the support of the US for their action (the US registered as a third party to the WTO dispute engaged in 2006).</p> <p>During the negotiation of the Doha waiver (2001), Ecuador made its approval contingent upon the creation of a special ad hoc arbitration procedure, which guarantees a timely review of whether the EU banana regime will diminish Ecuador's market access. If arbitrators find against the EU, Ecuador</p>	<p>Lightweights in terms of trade with the EU. They import small quantities of a variety of goods that would be a minor loss to the EU should these goods be restricted.¹⁴ Theoretically, Ecuador could threaten the EU to cross retaliate using TRIPS,¹⁵ the chances are that it will not do it for several reasons:</p> <ul style="list-style-type: none"> - Ecuador could lose aid coming from the EU¹⁶. - violating TRIPS could deter foreign investors from coming into the country.¹⁷ <p>The legal expense of pursuing a law suit against the EU through the WTO. Furthermore, L.A countries are subject to major criticism in terms of labour standards¹⁸ and environmental degradation caused by</p>	<p>A tariff that would help them increase banana sales in Europe and take advantage of a market without trade distortions created by preferential agreements such as that enjoyed by the ACP.</p> <p>The priority of these goals for L.A countries is questionable. It is possible that the existence of a preferential arrangement would not bother them if the single banana tariff was sufficiently low and that they are using the discrimination argument only as a means to pressure the EU into lowering the tariff.</p>	<p>Could lose the battle and have to raise their prices just like US firms¹⁹. They might continue to lose profits but it is unsure as, their exports have already increased from the moment in which the EU tariff went down to 176 euro.</p>

¹² Such an agreement is currently being prepared in the EU under the name of European Partnership Agreement. It envisages making the ACP countries adopt the form of a Free Trade Agreement (J. L. Perez Sanchez. "Obtaining the tariff equivalent to the current Banana regime in the European Union to Annex 5 of the WTO agreement on Agriculture" Sep 2004 Madrid.)

	could revoke the waiver for the Cotonou agreement and reinstate its dispute settlement case, which it suspended pending full compliance. ¹³	extensive banana production.		
ACP	Have long established, solid political relationships with the EU. If the EU was to turn its back on them, they would argue that their economies will turn to drug production and that the EU will have to welcome additional waves of immigrants who will have lost their jobs in the banana industry.	Are in a weak economic situation since they depend on the banana trade. This lack of trade diversification makes them reliant on the EU aid and decision making.	The loss of preferential agreement with the EU could force these countries to diversify their economies. They will probably receive even more subsidies ²⁰ from the EU in replacement for the loss of duty free quotas.	A reduction in the current tariff rate would make the ACP countries face the US and LA firms' output, with which they are not in a position to compete. These countries will lose their principal source of revenue and might revert to illegal sources of revenue.
EU	Is financially capable of sustaining trade sanctions although it is politically divided and, hence, it will probably not want a drawn out dispute or sanctions.	Is in a position whereby it tries to accommodate everyone. Suffers from internal dissensions (Germany does not agree with France, Spain and	It could use this dispute to finally solve the problem and be in full compliance with the WTO rules. Although, at the	The dispute settlement panel requested by Ecuador could rule that the EU's current banana regime does

¹³ McCall Smith, J « Compliance Bargaining in the WTO; Ecuador and the Banana Dispute » Prepared for a Conference on Developing Countries and the Trade Negotiation Process – UNCTAD, 6-7 Nov 2003, Geneva

¹⁴ Ethier, J. W. “ Intellectual property rights and dispute settlement in the world trade” Journal of International Economic Law; Jun 2004 Vol 7 no2

¹⁵ as in 1998-99 when Ecuador wanted to force the EU to comply with the WTO ruling

¹⁶ Breuss, F. “Economic integration, EU- US trade Conflicts and WTO dispute Settlement” in European Integration Online Papers (EIOP) vol 9 (2005) no 12 highlights the EU's implication in quietly supporting the external debt relief of Ecuador at the Paris Club in exchange for Ecuador not implementing cross retaliations.

¹⁷ This is precisely what happened with Ecuador. By 2000, it had no intentions of retaliating any longer.

¹⁸ Note that Labour standards are not part of WTO negotiations. Hence, the EU cannot use the argument of detrimental labour standards to justify the discrimination against the L.A banana producers. However, outside the framework of WTO negotiations Labour standards are included in other agreements that the EU and the US have with developing countries. Thus, this labour standards argument could still be applied. See WTO report called “The Evolving debate on Labour standards” IOE information paper March 2006. http://www.wto.org/english/forums_e/ngo_e/posp63_ioe_e.pdf

¹⁹ Fletcher, A. “Why EU banana reform does not please everyone” 21/04/2006 www.foodnavigator.com/news

		the UK).	moment, EU compliance exists with the WTO rules (the tariff was established by a WTO arbitrator and the quota has been agreed under the Doha Waiver).	not comply with WTO rules thereby making the EU subject to sanctions.
US	Is capable of imposing sanctions that would be very detrimental to the EU should it wish to take an active role in the current dispute.	The US is not in a position of weakness.	Could take advantage of the dispute brought about by Ecuador to benefit from a reduction in the tariff. Indeed, thanks to the MFN principle, if the EU grants a lower tariff to one of its trade partners (eg. Ecuador) for a specific good or service, it has to do the same for every trade partner.	Fear new areas of narco-trafficking in the Caribbean. US firms are not prepared to engage in another expensive battle to make the US government fight for their industry at the WTO. For instance, Chiquita is now diversifying into juice production.

PAST STRATEGIES EMPLOYED BY THE PARTIES

The current stalemate is, to a large extent, the consequence of the past strategies employed. Strategies can take different forms: competitive, compromising, cooperative, avoidance or accommodating,²¹ and their combination within a negotiation can lead to very different outcomes. It is interesting to review the progression of these strategies within the disagreement in question so as to understand the range of the possibilities that future negotiations could offer.

EVENTS (THE RE-OPENING OF THE DISPUTE)

- Pursuant to the 2001 agreement in which the EU agreed to a single EU tariff by 2006, the EU initially suggested a 230 euro tariff per tonne of imported bananas.
- Ecuador said it was too high – (uncooperative/competitive)
- The US Trade Representative announced disappointment with the high tariff devised by the EU
- EU left the table – (avoidance)
- Ecuador requested no tariff or a 75 euro per tonne tariff, or threatened to go to the WTO – (uncooperative/competitive)

²⁰ See 2006 Biennial Report on EU support under the Special Framework of Assistance (SFA) for traditional ACP suppliers of bananas. http://eur-lex/LexUriServ/site/en/com/2006/com2006_0806en01.pdf

²¹ Saner, R. *The Expert Negotiator*. 2 ed. Martinus Nijhoff Publishers. 2005. Chapter 4

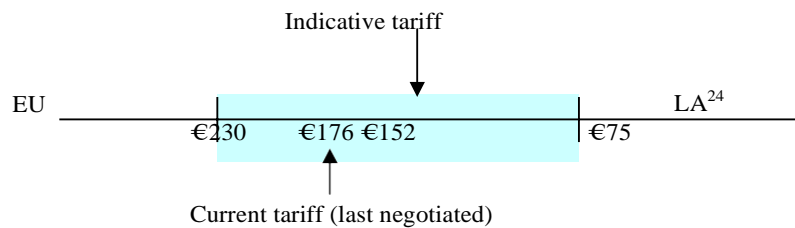
- EU refused – (uncooperative/avoidance)
- LA countries went to the WTO for arbitration on tariff regulation. The WTO arbitrator found in August 2005 that the proposed tariff would not result in at least maintaining total market access for suppliers under the Most Favoured Nations (MFN) clause.
- EU agreed on a tariff of 187 euro per tonne and maintained an equivalent level of preference for ACP bananas through a tariff quota for 775,000 tonnes at zero duty – more cooperative (compromise)
- The WTO forced the EU to reduce to 176 euro per tonne (more EU compromise) and set this tariff as final for the January 2006 deadline.
- Ecuador refused (competitive) still uncooperative and requests a WTO panel for consultations under Article 21.5 of the DSU and Article XXII of the GATT 1994

From the re-opening of the dispute, Ecuador has adopted a very competitive stance, whilst the EU, after trying to avoid the issue, has been inclined to compromise under the WTO's guidance. It is questionable as to whether the EU would have compromised at all without Ecuador's aggressive behaviour. However, setting the goal too high and keeping this competitive line in the long run puts Ecuador in a situation of being pulled out from the negotiation. They might have obtained more through direct negotiation with the EU.

Throughout the negotiations the main ground of disagreement has been the tariff rate adopted by the EU. This has led to a distributive bargaining outcome as argued by J. McCall Smith.²²

DISTRIBUTIVE BARGAINING²³

Zone of possible agreement



²² McCall Smith, J « Compliance Bargaining in the WTO; Ecuador and the Banana Dispute » Prepared for a Conference on Developing Countries and the Trade Negotiation Process – UNCTAD, 6-7 Nov 2003, Geneva

²³ Saner, R. *The Expert Negotiator*. Chapter 4

²⁴ This is currently only represented by Colombia and Ecuador

*Alternatives*²⁵

Is there a need for a new agreement at this point? Independently from what the WTO may determine, the parties to the dispute could find no agreement and either leave the situation as it is or just enforce retaliation measures.

Without agreement between the EU and the LA countries what could happen? First, the relationship between the two groups is turning sour. This could have repercussions on other trade agreements for the EU. However, the only real leverage LA countries have vis-à-vis the EU is through the WTO. It is questionable as to how useful the WTO threat is, since it is a WTO arbitrator himself who set the EU tariff at the current rate. The parties could simply wait until the WTO submits its ruling.

Secondly, the US could become active again depending on how its firms react to the new tariff. For the moment, Chiquita remains silent. This is probably because it adopted a new strategy after winning the import licenses in 2001: buying out ACP producers to benefit from their quota system and, more recently, that of diversifying away from pure banana trade. Chiquita also decided to increase the price of its bananas to offset the high tariff level imposed by the EU. The US government is leaning on Latin American countries to deal with the WTO dispute without taking an active role itself, as witnessed by its decision to enter the dispute as a third party and not as a co-complainant. This is probably because, 1) this battle is very expensive and Chiquita has already paid a high cost and 2) because the government is not really concerned with a trade market that is so narrow (0,3% of the transatlantic trade).

Thirdly, Ecuador and the other Latin American producers could raise their prices, as Chiquita did in order to offset the price of the bananas. While this would render them less competitive, since it is the general trend among the biggest banana producers/distributors, the real cost would be borne by EU consumers who are already accustomed to high priced bananas. This alternative could lead Ecuador to support EU consumer interest groups who fight for cheaper goods, thus influencing the commission to lower the tariffs.

Finally, perhaps the best alternative to finding an agreement which improves Latin American banana exports would be to help ACP countries develop and diversify their economies so as to give them the tools to handle a liberalisation of trade in the future. The EU is already taking such approach with the EPA (European Partnership Agreement).²⁶ This alternative has the disadvantage of being long-term and it also requires an industrial strategy for ACP countries that may not have the economic structure in terms of labour and infrastructure to meet the immediate challenge of economic diversification initiatives.

Furthermore, although this would solve the ACP problems, EU producers (representing 20% of the market) would still have to be protected by the EU. The possibility of a 0 tariff would, thus, not be possible.

Despite that this alternative promotes the status quo in the short run, it is attractive because it sets the basis for an agreement in the long run. Diversifying an economy takes time, hence, in the short run, the banana trade of ACP countries is crucial for them and they will not abandon it. However, once the structures are in place, thanks to the shift of the

²⁵ Sebenius, J. K. "International Negotiation Analysis" in *International Negotiations: Analysis, Approaches, Issues* (2002) Kremenjuk, V.A. (ed.) p.235

²⁶ These EPAs are currently under negotiations with ACPs. Their analysis is beyond the scope of this paper.

banana income towards another sector of the economy, then a solution with Latin American countries can be found because the stakes have changed.

NEW POSSIBLE SCENARIOS: STRATEGIES AND TACTICS

Possible scenarios

1. The current EU banana tariff stays the same, WTO rules in favour of the EU and the ACP countries.
2. The tariff is rejected by the WTO, LA countries impose sanctions. The EU starts new negotiations and is ready to compromise on new tariff levels as long as it takes into account ACP countries' needs.
3. Same as above, but the EU does not respond to the sanctions and carries on elaborating the European Partnership Agreement²⁷ (which now includes bananas) with the aim of consolidating ACP's countries economies whilst also boosting their exports competitiveness.
4. A compromise is found on the tariff levels between the parties before the WTO ruling due to the intervention of the US. This does not take into account the ACP countries needs and interests.
5. A cooperative solution is found between the parties based on the needs and interests of all the parties involved including the ACP countries.

The following strategies and tactics are elaborated on the basis of these scenarios:

The best solution: Integrative bargaining²⁸ (based on scenario 5)

In this situation, there is a single issue to be negotiated: EU banana import tariff levels. Hence, it is difficult to see how an integrative solution could be found.

However, beyond the tariff levels, some common interests could involve, including:

- a) the importance for the EU to import bananas coming from L.A. countries (since the EU internal production is not sufficient).
- b) the importance for the EU not to make consumers pay a price for bananas that is too high. Hence to have a proportionate tariff.
- c) the importance for both parties to follow WTO rules so as to be credible in the eyes of the international community.
- d) the will to improve the situation of workers in banana plantations on both sides (this will is rather weak but is worth noting).
- e) the will to avoid new or increased narco-trafficking zones.

EU wins if the tariff stays the same and they secure ACP countries' stable revenues and their own banana markets.

LA countries win if they succeed in reducing the tariff to somewhere between 75 euro to 150 euro (Ecuador has expressed its ambition to achieve a rate of 95 euro), and if this leads to increasing their banana exports to the EU. It also wins if the WTO determines

²⁷ Julian, M. "EPA Negotiation Update; the state of affairs as of mid March 2007" European Centre for Development Policy Management, 20 March 2007; www.acp-eu-trade.org

²⁸ Saner, R. *The Expert Negotiator*. Chapter 8

that the current regime is not in compliance with WTO rules and if the EU responds to this ruling by re-engaging in negotiations.

A Pareto Optimal solution would therefore involve:

1. ACP countries being able to generate a decent income from their own trade.

This could be resolved through trade diversification with the help of developed countries or through an effective implementation of fair trade²⁹ (raising prices on bananas coming from ACP countries). In this respect, the EU is already carrying out diversification and competitiveness programs to help ACP countries increase their productivity in different sectors of their economies.³⁰

2. EU internal production being able to sell their production as well.

This could be resolved through subsidies (although the WTO is trying to prevent the subsidization of agriculture) if tariffs are not sufficient. The goal here is to keep EU banana production whilst securing decent prices for EU consumers.

3. LA countries make more profit out of their banana trade with the EU.

This could occur if they increase their prices at the same time as all the other actors in the banana industry or if tariffs are reduced by the EU (or a combination of both).

Therefore an integrative agreement would include the above elements of solution in varying degrees.

*Alternative strategies and tactics if the parties do not engage in cooperation (based on scenarios 1 to 4):*³¹

EU and ACP countries

The EU could:

- argue that the likelihood that the WTO rules in its favour is high and that Ecuador is playing a dangerous game by not negotiating amicably and settling before the ruling (*competitive, playing on time constraints*);
- avoid any discussions until the WTO issues its ruling (*avoidance*);
- commit to helping LA countries find alternative methods of becoming more competitive or, commit on its resolution not to renew quotas for ACP countries after 2008 (*compromising, using adjournment tactic*);
- influence the LA countries by shaming them: Do they really want to destroy already poor economies ? (*competitive, playing on values perceptions*);
- argue that the production methods adopted in LA countries are damaging the environment and to safe labour practices and thus, it will not further facilitate it by

²⁹ Fair trade is proving to be successful in a number of countries. Roosevelt Skerrit (Domenican Republic's Prime Minister, recently declared that fair trade is critical to Domenica's development and that it has reversed an almost catastrophic recession. www.agritrade.com news May 2007

³⁰ Press Report. FreshPlaza.com March 23rd 2007. www.freshplaza.com/2007/0323/2_jm_banana_exports.html

³¹ The concepts used in this analysis are taken from two sources: Saner, R. *The Expert Negotiator* (2005) 2 ed. Martinus Nijhoff Publishers, chap 81 and J. K. Sebenius, "International Negotiation Analysis" in *International Negotiations: Analysis, Approaches, Issues* (2002) Kremenlyuk, V.A. (ed.) p.235

decreasing tariffs (*competitive, playing on values perceptions*) or threaten L.A. countries “if you agree to the present tariff, the EU will not ask to send ILO inspectors in your banana plantations” (*competitive aggressive*).

There is no reason why the EU should be accommodating at the moment since L.A. countries do not have sufficient bargaining power to pressure the EU into accepting their conditions.

Latin American countries and the US

- L.A. countries could try to obtain increased US support (*competitive, alliance building*), as they are third parties in the conflict. Indeed, US firms like Chiquita are particularly affected by the new EU tariff and this could push them to pressure the US government, as was the case in the past. If the US agrees to become more active, it is likely that the EU would become more responsive. However, based on precedent, the EU usually takes a long time to respond to pressures and by that time, the quota regime in force in the ACP countries will have disappeared, thereby leaving more room for L.A. exports.³²
- It could perhaps be more advantageous to wait and see what happens in 2008 (*compromise, adjournment tactic*). A relatively high tariff rate is still favourable to countries that export less, such as the ACPs and L.A. nations, might continue to argue about this but the chances that the WTO will support their claim are slim.
- LA countries should try and obtain commitments from the EU that from 2008 onwards, it will seek to make the market more competitive by gradually lowering the tariff. This commitment could be made in exchange for a commitment by L.A. countries to improve their environmental and labour standards (*compromise, seeking commitments exchanges*). This deal could not be part of WTO negotiations because labour standards do not enter in these negotiations, however, it could still occur as a side deal.
- They could also argue that the EU needs to develop a strategy whereby it encourages fair trade for ACP banana producers (*competitive, playing on values*).
- Finally, L.A. countries could simply accept the current tariff, especially if the WTO rules in favour of the current rate (*accommodating*).
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CONCLUSION

The most probable scenario is that the EU will not negotiate a further agreement until it learns the WTO's ruling on Ecuador's claim. This reasoning is grounded in the fact that the EU tariff was established agreement with a WTO arbitrator, which makes an adverse ruling unlikely. If the ruling is adverse, then the EU will have to renegotiate a lower tariff but it will have gained time, which is necessary for the ACP countries to devise new strategies of income generation. The EPA, is currently being devised by the EU to replace the Cotonou Agreement is likely to replace the existing quota/duty-free preferential agreement without infringing on WTO principles. The L.A. countries will thus have to wait and see unless they are able to motivate the US back to the front line of the negotiations, which is unlikely at the moment.

³² That is only if the quota regime does not turn into another form of preferential arrangement compatible with WTO rules.

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CONCLUSION

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This book has been written to illustrate the increase in multi-actor diplomacy as well as the participation of state and non-state actors in cross-border conflicts and negotiation processes. Case analyses are offered in order to describe complex multi-actor conflicts in the social, economic, military and political spheres in Western and non-Western economies. The goal is to help the reader better understand the patterns of interaction and the negotiations processes between state and non-actors in these countries, and how their typologies vary depending on the conflict, the number of participating actors, and the constellation of policy environments.

Globalisation and the technological revolution have increased the speed of change not only within the sphere of daily life but also within the sphere of international relations. The greater availability of knowledge and easier access to information has spurred higher aspirations among people. Internet-based technology makes it possible for people and businesses to establish supra-territorial relationships, which in the past were only within the reach of a privileged few.

One of the unforeseen developments of globalisation is the participation of non-state actors in diplomacy. Traditionally, diplomacy has been the prerogative of ambassadors and envoys representing MOFAs and central government offices, with mandates confined to the affairs of the state. Today, the management of international relations is no longer restricted to State affairs, but extends to social, political and economic affairs as well. Protagonists of these new interest groups are often business executives, members of civil society and representatives of NGOs.

Seen from the case analyses provided by the various contributors of this book, it appears necessary for different actors in the enlarged sphere of contemporary diplomacy to acquire the additional competencies (domain expertise) for constructive engagement in policy dialogue. It may also become increasingly possible that MOFAs and state diplomats adapt their traditional roles and functions from being inward-looking, exclusive, and secretive actors to becoming a more reachable, outgoing, and inclusive diplomats – constantly searching for the possible inclusion of other actors be they state (other ministries) or non-state (business diplomats and T-NGO diplomats).

New times call for a modification of traditional roles and responsibilities. Ministries of Foreign Affairs are no longer the sole guardians of diplomacy. Rather, they have to share the diplomatic "space" with other ministries and learn to constructively engage non-state actors in dialogue via proactive consultations and future oriented cooperation, thereby ensuring the legitimacy of policy decisions and the security of policy implementation.

In the final analysis, sustainable development in a global context demands equitable representation of multiple stakeholders, understanding that the relationships among them are intricate and web-like, and are not confined to political or geographic boundaries. "Diplomatic" skills are and will be employed by all parties to promote individual views and profiles. Today's diplomacy should be seen in its full complexity and complement Wieseman's concept of polyilateral diplomacy with the concept of polycentric diplomacy.

Effective international relations now requires effective representation of the key stakeholders including MOFAs, other ministries with social, political and economic policy competencies, transnationally active enterprises (TNCs) and transnationally active I-NGOs.

The relationship between these stakeholders and constituencies can be difficult. Therefore, it is of paramount importance that all forms of diplomacy are represented in the most competent manner possible in order either prevent conflicts where ever possible or resolve them in a constructive manner. This can help ensure sustainable socio-economic development with the highest possible equity across political and geographical boundaries.